

EDITOR'S NOTE

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84-1360-AFX
Status: GRANTED

Title: City of Renton, et al., Appellants
v.
Playtime Theatres, Inc., et al.

cketed:
bruary 26, 1985

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for appellant: Prettyman Jr., E. Barrett

Counsel for appellee: Eikenberry, Kenneth C., Burns, Jack R.

| try | Date | Note | Proceedings and Orders |
|-----|-------------|------|---|
| 1 | Feb 26 1985 | G | statement as to jurisdiction filed. |
| 2 | Feb 26 1985 | | Appendix of appellant Renton, et al. filed. |
| 3 | Mar 20 1985 | | Motion of appellees Playtime Theatres, et al. to affirm filed. |
| 4 | Mar 27 1985 | | DISTRIBUTED. April 12, 1985 |
| 5 | Mar 28 1985 | X | Reply brief of appellants Renton, et al. filed. |
| 6 | Mar 29 1985 | X | Brief amicus curiae of Whittier, CA, et al. filed. |
| 7 | Mar 29 1985 | G | Motion of National League of Cities, et al. for leave to file a brief as amici curiae filed. |
| 8 | Mar 28 1985 | X | Brief amicus curiae of Washington, et al. filed. |
| 9 | Apr 15 1985 | | Motion of National League of Cities, et al. for leave to file a brief as amici curiae GRANTED. |
| 0 | Apr 15 1985 | | PROBABLE JURISDICTION NOTED. ***** |
| 2 | May 6 1985 | | Order extending time to file brief of appellant on the merits until June 30, 1985. |
| 4 | May 6 1985 | | Order extending time to file brief of appellee on the merits until August 15, 1985. |
| 5 | May 22 1985 | D | Motion of appellees to exclude documents from the joint appendix filed. |
| 6 | May 24 1985 | | Opposition of Appellants to motion of appellees to exclude documents from the joint appendix filed. |
| 7 | May 31 1985 | | DISTRIBUTED. June 6, 1985. (Motion of appellees to exclude documents from the joint appendix). |
| 3 | Jun 10 1985 | | Motion of appellees to exclude documents from the joint appendix DENIED. |
| 9 | Jun 14 1985 | | Record filed. |
| 0 | Jun 14 1985 | | Certified original record & C.A. proceedings, 4 volumes, received. |
| 1 | Jun 28 1985 | | Joint appendix filed. |
| 2 | Jun 28 1985 | G | Motion of National Institute of Municipal Law Officers for leave to file a brief as amici curiae filed. |
| 3 | Jun 28 1985 | | Brief of appellants Renton, et al. filed. |
| 4 | Jun 28 1985 | | Brief amicus curiae of Jackson County, MO filed. |
| 5 | Jun 28 1985 | G | Motion of National League of Cities, et al. for leave to file a brief as amici curiae filed. |
| 7 | Jul 3 1985 | G | Motion of Freedom Council Foundation for leave to file a brief as amici curiae filed. |
| 8 | Aug 14 1985 | | Brief of appellees Playtime Theatres, et al. filed. |
| 9 | Aug 15 1985 | | Brief amicus curiae of Outdoor Advertising Assn. of America, et al. filed. |
| 0 | Aug 15 1985 | | Brief amicus curiae of American Booksellers Association, et |

| try | Date | Note | Proceedings and Orders |
|-----|-------------|--|------------------------|
| 1 | Aug 15 1985 | al. filed. brief amicus curiae of American Civil Liberties Union, et al. filed. | |
| 2 | Aug 20 1985 | CIRCULATED. | |
| 3 | Sep 11 1985 | SET FOR ARGUMENT. Tuesday, November 12, 1985. (2nd case). | |
| 4 | Sep 18 1985 | Motion of National Institute of Municipal Law Officers for leave to file a brief as amicus curiae GRANTED. | |
| 5 | Sep 18 1985 | Motion of National League of Cities, et al. for leave to file a brief as amici curiae GRANTED. | |
| 6 | Sep 18 1985 | Motion of Freedom Council Foundation for leave to file a brief as amicus curiae GRANTED. | |
| 7 | Oct 25 1985 | X Reply brief of appellants Renton, et al. filed. | |
| 8 | Oct 30 1985 | X Supplemental brief of appellees Playtime Theatres, et al. filed. | |
| 9 | Nov 6 1985 | X Supplemental brief of appellees Playtime Theatres, et al. (SECOND) filed. | |
| 0 | Nov 12 1985 | ARGUED. | |

84-1360

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No.

ALFONSO L. STEVENS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

THE CITY OF RENTON, *et al.*,
v. *Appellants,*

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

APPENDIX TO
JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 83-3805, 83-3980

PLAYTIME THEATERS, INC.,
a Washington corporation, *et al.*,
Plaintiffs-Appellants,
v.

THE CITY OF RENTON, *et al.*,
Defendants-Appellees.

THE CITY OF RENTON,
a municipal corporation, *et al.*,
Plaintiffs-Appellants,
v.

PLAYTIME THEATERS, INC.,
a Washington corporation, *et al.*,
Defendants-Appellees.

Argued and Submitted May 9, 1984

Decided Nov. 28, 1984

Robert Eugene Smith, Encino, Cal., for Playtime Theaters, Inc.

Lawrence J. Warren, Daniel Kellogg, Warren & Kellogg, Renton, Wash., for City of Renton.

Appeal from the United States District Court
for the Western District of Washington

Before FLETCHER and FARRIS, Circuit Judges, and
JAMESON,* District Judge.

FLETCHER, Circuit Judge:

These consolidated cases are declaratory judgment actions involving the constitutionality of the City of Renton's zoning ordinances regulating the location of adult motion picture theaters.

In case number 83-3805, Playtime Theaters, Inc. ("Playtime") appeals the district court's order denying a permanent injunction and finding that the ordinance furthers a substantial governmental interest, is unrelated to the suppression of speech, and is no more restrictive than necessary to further that interest. Case number 83-3980 is a declaratory action involving the same parties and issues, filed by the City of Renton in state court after federal proceedings had begun. This action was twice removed to federal court and twice remanded to state court. Renton appeals the district court's denial of its motion for fees and costs on the second removal. We reverse in number 83-3805 and affirm in number 83-3980.

I

BACKGROUND

In April, 1981, the City of Renton enacted ordinance number 3526 which prohibited any "adult motion picture theater"¹ within one thousand feet of any residential

* Hon. William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

¹ The first ordinance defined an "adult motion picture theater" as an enclosed building used for presenting motion picture films,

zone or single or multiple family dwelling, any church or other religious institution, and any public park or area zoned for such use. The ordinance further prohibited any such theater from locating within one mile of any public or private school. At the time this ordinance was enacted, no adult theaters were located in Renton, although there were other theaters within the proscribed area.

In January, 1982, Playtime acquired two existing theaters in Renton with the purpose of exhibiting adult motion pictures in at least one, the Renton Theater, which is

video cassettes, cable television, or any other such visual media, distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as hereafter defined, for observation by patrons therein.

The ordinance defined these terms as follows:

2. "Specified Sexual Activities":

- (a) Human genitals in a state of sexual stimulation or arousal;
- (b) Acts of human masturbation, sexual intercourse or sodomy;
- (c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

3. "Specified Anatomical Areas":

- (a) Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and
- (b) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

The second ordinance expanded the defined term of "used" as:

a continuing course of conduct of exhibiting "specific [sic specified?] sexual activities" and "specified anatomical area[]" in a manner which appeals to a prurient interest.

located within the area proscribed by ordinance number 3526.²

Just prior to closing the sale of the theater, on January 20, 1982, Playtime filed an action in federal court, seeking a declaration that the ordinance was unconstitutional and a permanent injunction against its enforcement.

A month later, on February 19, 1982, Renton brought suit in state court seeking a declaratory judgment that the ordinance was constitutional on its face and as applied to Playtime's proposed use. The complaint alleged that an actual dispute existed because of the pending federal lawsuit and because Playtime asserted that the ordinance was unconstitutional. On February 22, 1982, Renton moved to dismiss Playtime's federal action on the grounds that the federal court should abstain in favor of the state action, citing *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).

On March 8, 1982, Playtime removed the state action to federal court and Renton moved to remand. On March 25, the magistrate filed his recommendation that abstention was improper in the first action and on April 9, he recommended that the removed state action be remanded for lack of jurisdiction because the complaint failed to state a claim upon which relief could be granted. The district court approved both recommendations, denying the motion to dismiss the federal action on May 5, 1982, and remanding the state action on January 13, 1983.

² For the purposes of this opinion, "adult motion picture theater" or "adult theater" refers to the definition used by the City. See *supra* note 1. We express no view as to the effect of this definition on the constitutionality of the ordinance. See *infra* note 18.

On May 3, 1982, Renton passed an emergency ordinance, amending ordinance number 3526. The new ordinance added an elaborate statement of reasons for the enactment of the ordinances,³ it further defined the word

³ The City gave the following reasons in the amended ordinance:

1. Areas within close walking distance of single and multiple family dwellings should be free of adult entertainment land uses.
2. Areas where children could be expected to walk, patronize or recreate should be free of adult entertainment land uses.
3. Adult entertainment land uses should be located in areas of the City which are not in close proximity to residential uses, churches, parks and other public facilities, and schools.
4. The image of the City of Renton as a pleasant and attractive place to reside will be adversely affected by the presence of adult entertainment land uses in close proximity to residential land uses, churches, parks and other public facilities, and schools.
5. Regulation of adult entertainment land uses should be developed to prevent deterioration and/or degradation of the vitality of the community before the problem exists, rather than in response to an existing problem.
6. Commercial areas of the City patronized by young people and children should be free of adult entertainment land uses.
7. The Renton School District opposes a location of adult entertainment land uses within the perimeters of its policy regarding bussing of students, so that students walking to school will not be subjected to confrontation with the existence of adult entertainment land uses.
8. The Renton School District finds that location of adult entertainment land uses in areas of the City which are in close proximity to schools, and commercial areas patronized by students and young people, will have a detrimental effect upon the quality of education which the School District is providing for its students.
9. The Renton School District finds that education of its students will be negatively affected by location of adult entertainment land uses in close proximity to location of schools.
10. Adult entertainment land uses should be regulations [sic] by zoning to separate it from other dissimilar uses just as

Four years later, the Supreme Court of Washington, sitting *en banc*, unanimously upheld two zoning ordinances that required adult theatres to be located in certain downtown areas of Seattle. *Northend Cinema, Inc. v. City of Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978). Reciting extensive studies demonstrating the problems created by such theatres in residential and commercial areas, the court held that even though some ten adult theatres would be forced to relocate, the ordinances were valid under *Young*. The residents of Seattle had expressed concerns about the attraction of transients, parking and traffic problems, increased crime, decreasing property values, and interference with parental responsibilities toward children. "In short, the goal of the City in amending its zoning code was to preserve the character and quality of residential life in its neighborhoods * * *. A second and related goal * * * was to protect neighborhood children from increased safety hazards, and offensive and dehumanizing influence created by location of adult movie theatres in residential areas." 585 P.2d at 1155.

The effect of the Seattle restrictions was to force adult theatres into an area consisting of approximately 250 acres (or less than 1% of the city's acreage). *Id.* at 1156. Noting that this Court had approved the "concentration" as well as the "dispersal" method of zoning theatres in *Young*, the Washington Supreme Court ruled that Seattle's planning effort "must be accorded a sufficient degree of flexibility for experimentation and innovation." 585 P.2d at 1159. This Court denied certiorari in the case. 441 U.S. 946 (1979).

A year later, and partly as a result of these two decisions, events began unfolding in Renton, Washington.

Appellant Renton is a small city, with a 1981 population of 32,200,² whose northern border is approximately

² Cl. aff., Jan. 27, 1982, at 1. The terms "aff.", "test." and "dep." refer to "affidavit," "testimony" and "deposition", respectively. "Cl." refers to David R. Clemens, Renton's Policy Development Director; "And." refers to Bruce Anderson, an associate real

one mile from the southern border of Seattle. In mid-1980, the Renton City Council began to study the regulation of adult entertainment land uses.³ The Council and its Planning and Development Committee held numerous meetings—all of them open to the public—to consider this issue.⁴ Testimony was taken at several meetings. At one meeting, for example, 64 persons attended, and 28 of them spoke.⁵ Among those offering statements were the head of the Renton Chamber of Commerce and the Superintendent of Schools.⁶ There was testimony about adult theatres in relation to their impact on commercial property values, concern about crime, the deterioration of residential neighborhoods, effects on children, etc.⁷ In the meantime, the office of the City's Acting Planning Director had received and studied documents from Seattle underlying that city's own ordinance, including a summary of findings and conclusions, and the Director had studied the *Northend Cinema* decision.⁸ This Court's findings and decision in *Young* were also reviewed,⁹ as well as the approaches taken by numerous other cities, inside and outside the State of Washington.¹⁰ There was a report from the Renton City Attorney's office and from the Acting

estate broker testifying for Appellee Playtime; "Forbes" refers to Roger H. Forbes, President of Playtime; "John." refers to Jimmy Johnson, an executive with a company that acquires adult theatres; and "Burns" refers to Jack R. Burns, a Playtime attorney.

³ Burns aff., Jan. 27, 1982, at Exs. 1-10.

⁴ Cl. dep., Mar. 3, 1982, at 41-44. The Committee alone held at least six meetings. *Id.*

⁵ Cl. aff., Jan. 27, 1982, at 3; see also Cl. dep., Mar. 4, 1982, at 35.

⁶ Cl. test., Jan. 29, 1982, at 27-29; Cl. dep., Mar. 3, 1982, at 45-48.

⁷ Cl. dep., Mar. 4, 1982, at 14; Cl. test., Jan. 29, 1982, at 34; Cl. aff., Jan. 27, 1982, at 3-5. See also Renton, Wa., Ordinance 3629 (May 3, 1982), App. 81a.

⁸ Cl. test., Jan. 29, 1982, at 31-33.

⁹ Cl. dep., March 4, 1982, at 7-8.

¹⁰ *Id.* at 5-12, 50-52.

Planning Director, who himself had had prior experience with similar problems in California.¹¹ All of these proceedings were carried out in the usual way, following normal City Council procedures.¹²

After almost a year's study of adult uses, the City Council adopted an ordinance (No. 3526) on April 13, 1981, which defined an "adult motion picture theater" in terms of a building "used for" the exhibition of visual media depicting "specified sexual activities" or "specified anatomical areas." App. 78a. It prohibited such theatres from locating within 1,000 feet of any residential area, church, park, or religious facility or institution, or within one mile of any school. The ordinance was modeled after, and was virtually identical to, the ordinances that had been approved in *Young* and *Northend Cinema*. See App. 99a-139a (where the Detroit and Seattle ordinances are set forth in their entirety). At the time the first Renton ordinance was enacted, there were no adult theatres located in Renton, nor any sign that one would move into the city.

Nine months later, on January 20, 1982, Appellees Playtime Theatres, Inc.,¹³ and Kukio Bay Properties, Inc., brought a suit in the United States District Court for the Western District of Washington alleging that Kukio had contracted to purchase two motion picture theatres in downtown Renton and to lease them to Playtime.¹⁴

¹¹ Cl. aff., Jan. 27, 1982, at 3; Cl. test., Jan. 29, 1982, at 33-34; Cl. dep., Mar. 4, 1982, at 17.

¹² Cl. dep., Mar. 4, 1982, at 24-25.

¹³ Playtime was the same company that had operated adult theatres in Seattle, Tacoma, and at least three other cities in the State of Washington. Forbes dep., Apr. 9, 1982, at 6, 8.

¹⁴ Playtime's President admitted that he was fully aware in December or January, when he was considering the possibility of entering Renton, that there was an ordinance then in place prohibiting adult theatres in the area where he was seeking to locate. Forbes dep., May 27, 1982, at 15-17.

Kukio and Playtime conceded in their Complaint that their theatres would "continuously operate exhibiting adult motion picture film fare to an adult public audience." App. 61a. The Complaint alleged (App. 67a-71a) that Renton's ordinance was unconstitutional on its face and as applied to the plaintiffs under, among other things, the First and Fourteenth Amendments, and that it was not susceptible of a constitutional construction. App. 68a-69a. Kukio and Playtime (hereinafter collectively "Playtime") sought, *inter alia*, a declaratory judgment and a preliminary and permanent injunction. App. 75a-76a.

On May 3, 1982, the City Council passed a second zoning ordinance (No. 3629), amending the prior one. Insofar as relevant here, the amendment (a) spelled out the fact that in passing the prior ordinance, the City Council had relied upon the decisions in *Young* and *Northend Cinema* (App. 81a); (b) summarized some of the testimony received at its public hearings (App. 81a-85a); (c) set forth findings of fact that had formed the basis of the prior ordinance (*id.*); (d) defined "used" in the prior ordinance to mean "a continuing course of conduct" (App. 87a); and (e) reduced the restriction on locating near schools from one mile to 1,000 feet. App. 87a.¹⁵

Among the City Council's findings were these: (1) the location of adult theatres in close proximity to residential areas, churches, parks, and schools may lead to increased criminal activities, including prostitution; (2) the location of adult theatres has a deteriorating effect on the areas of the city in which they are located; and (3) reasonable regulation of adult theatre locations will pro-

¹⁵ The amendment also declared a state of emergency to exist, and it included a severability clause and a declaration that a violation of the ordinance was a public nuisance, which was subject to abatement by civil action. App. 88a-89a.

tect the character of the community and its property values while providing access to those who desire to patronize adult theatres. App. 82a-84a.

Finally, on June 14, 1982, the City Council, on advice of counsel, adopted a third ordinance (No. 3637) which reenacted Ordinance 3629 without an emergency clause. App. 90a. These three ordinances will hereinafter be referred to collectively as "the ordinance".

By drawing a series of circles around the areas restricted by the ordinance, one could determine that the effect of the ordinance was to set aside 520 acres within which adult theatres could locate.¹⁶ The set-aside zone contained "primarily developed, existing commercial development of various types" as well as "areas that are currently underdeveloped and in the process of transition to developed uses."¹⁷ The area set aside included land "in all stages of development from raw land to developed, improved and occupied office space, warehouse space and industrial space."¹⁸

After a hearing, a Magistrate submitted a report recommending that Renton's ordinance be held in violation of the First Amendment. App. 37a.¹⁹ A preliminary injunction issued, but the District Court later granted summary judgment in Renton's favor and dissolved the injunction.

¹⁶ Cl. aff., May 26, 1982, at 2.

¹⁷ Cl. test., June 23, 1982, at 62.

¹⁸ Cl. aff., May 26, 1982, at 2.

¹⁹ There were several attempts by Renton to have the District Court abstain in favor of the state court, but both courts below held that federal jurisdiction was appropriate. Even though we believe the courts below were in error in regard to abstention (cf. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982)), that issue is not pursued in this appeal.

The District Court ruled that Renton's ordinance "in its essential features is virtually identical" to the Detroit and Seattle ordinances, except that the word "used" was more precisely defined in the Renton ordinance. App. 26a. The intrusion into First Amendment interests was not substantial because the ordinance's restrictions were even narrower than those in the Detroit and Seattle ordinances, no theatre had been closed, there was no content limitation, and the availability of 520 acres contradicted the notion of a substantial restriction on protected speech. According to the District Court, the burden of having to locate a theatre within the set-aside area was no different than the burden upon other land users "who must work with what land is available to them in the city." App. 27a. The trial court found that the acreage available to Playtime and other adult theatres was comprised of land "in all stages of development * * * that is criss-crossed by freeways, highways, and roads * * *." App. 28a.

Furthermore, the District Court found that Renton's ordinance met all four parts of the *O'Brien* test.²⁰ In particular, Renton's articulated interests in protection of its community through zoning were furthered by its ordinance. There was no evidence that the secondary effects of adult land uses in Renton would be different than those in Seattle, Tacoma, or Detroit, and the experience of other cities and towns "must constitute some evidence" for the City Council to consider; the "observed effects in nearby cities provides persuasive circumstantial evidence of the undesirable secondary effects" Renton was attempting to obviate. Renton, according to the District Court, was entitled to experiment in this admittedly delicate and serious area. App. 30a. While some citizens at public meetings predictably expressed concerns that would have formed an impermissible basis for the ordi-

²⁰ See n.1, *supra*.

nance, these statements "should not negate the legitimate, predominate concerns of the City Council * * *." App. 31a. Thus, because Renton's "effort to preserve the quality of its urban life * * * is minimally intrusive of a particular category of [the] protected expression" described in *Young* (App. 32a), the District Court granted Renton's motion for summary judgment.

The Ninth Circuit reversed and held Renton's ordinance in violation of the First Amendment. App. 22a. It refused to review the District Court's *O'Brien* rulings under a clearly erroneous test but instead considered them as mixed questions of law and fact, subject to *de novo* review. The Ninth Circuit ruled:

1. Renton improperly relied on the experience of other cities in trying to prove a significant governmental interest to support its enactment. The Court of Appeals distinguished Renton's ordinance from that in *Young* because Detroit's ordinance *dispersed* adult theaters, whereas Renton's *concentrated* them in one area. App. 17a. Furthermore, Renton had to "justify its ordinance in the context of *Renton's* problems—not Seattle's or Detroit's problems." *Id.*; emphasis in original. "Renton has not studied the effects of adult theaters and applied any such findings to the particular problems or needs of Renton." App. 19a. Detroit's studies "are simply not relevant to the concerns of the Renton ordinance * * *." *Id.*

2. Without disagreeing that 520 acres were outside the restricted zone, the court concluded that the land was not "available" in the constitutional sense because "a substantial part" was undeveloped or already occupied by various industrial and commercial concerns. App. 13a.

3. Because some citizens at public hearings had expressed disapproval of adult movies, there was "at least an inference that a motivating factor behind the ordinance was suppression of the content" of speech. The

test was not the "predominate" concern of the City Council; where mixed motives are apparent, the test is whether "a *motivating factor* in the zoning decision was to restrict" First Amendment rights.²¹

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Cities and towns across the country have struggled since *Young* to regulate the location of adult establishments within their borders. Only a few of their zoning ordinances have been upheld—and only *one* federal Circuit has sustained the validity of a *Young*-style adult theatre ordinance on the merits.²² Most have been struck

²¹ App. 20a (quoting *Tovar v. Billmeyer*, 721 F.2d 1260, 1266 (9th Cir. 1983) (emphasis by the *Playtime* court), cert. denied, 105 S. Ct. 223 (1984)).

One sentence in the Court of Appeals' decision (App. 20a-21a) could be read to mean that this case was being remanded for further hearings on the issue of intent. The Ninth Circuit's remand "for proceedings consistent with this opinion" does not, of course, preclude this Court from treating the lower court's decision as final for purposes of appeal. See generally *Moore v. New York Cotton Exchange*, 270 U.S. 593, 603 (1926); *Gulf Refining Co. v. United States*, 269 U.S. 125, 136 (1925). Moreover, this case is not interlocutory as it relates to the issues here presented for review.

Subsequent to the decision below, *Playtime* filed with the District Court a "Motion for Entry of Judgment" with an accompanying memorandum arguing that the record is complete and may not be supplemented, and therefore the only remaining course of action now open, consistent with the Ninth Circuit's opinion, is the entry of a judgment declaring the Renton ordinance unconstitutional, granting a permanent injunction, and setting the matter down for a hearing on *Playtime's* damage claims.

Even if *Playtime* is wrong in its Motion, any new proceeding would require Renton to submit evidence under the wrong standard, as demonstrated below.

²² *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980). See also *Northend Cinema, Inc. v. City of Seattle*, supra; *City of Whittier v. Walnut Properties, Inc.*, 149 Cal. App. 3d 633, 197 Cal. Rptr. 127 (2d Dist.), vacating 189 Cal. Rptr. 12 (2d Dist. 1983); *County*

down because of an actual or practical unavailability of alternative sites,²³ an intent to inhibit,²⁴ or the effect of inhibiting,²⁵ one or more existing or imminent adult establishments; and/or an intent to suppress the content of adult films.²⁶ In summary, *Young*-style ordinances

of *Sacramento v. Superior Court*, 137 Cal. App. 3d 448, 187 Cal. Rptr. 154 (3d Dist. 1982); *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979) (statutory prohibition against two adult establishments in one building tantamount to zoning and upheld under *Young*), cert. denied, 447 U.S. 929 (1980); *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984) (appeal from preliminary injunction).

²³ E.g., *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1209, 1212, 1214 (5th Cir. 1982); *Alexander v. City of Minneapolis*, 531 F. Supp. 1162, 1168-69 (D. Minn. 1982), aff'd, 698 F.2d 936 (8th Cir. 1983); *CLR Corp. v. Henline*, 520 F. Supp. 760, 767 (W.D. Mich. 1981), aff'd, 702 F.2d 637 (6th Cir. 1983); *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207, 1209, 1214, 1215-17 (N.D. Ga. 1981); *E&B Enterprises v. City of University Park*, 449 F. Supp. 695, 697 (N.D. Tex. 1977); *Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696, 701-702 (M.D. Fla. 1978). Cf. *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d at 1213-15 (preliminary injunction denied where theatre owner failed to show that alternative sites were not available); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 336 (5th Cir. 1981) (re abortion clinics); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 96-99 (6th Cir. 1981) (ordinance totally prohibited adult theatres).

²⁴ E.g., *Tovar v. Billmeyer*, 721 F.2d at 1264-65; *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1348-49 (9th Cir. 1982); *Basiardanes v. City of Galveston*, 682 F.2d at 1216; *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659, 661-662 (8th Cir. 1981). See also *Ebel v. City of Corona*, 698 F.2d 390, 393 (9th Cir. 1983); *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1119, 1124-25 (1st Cir. 1981).

²⁵ E.g., *Alexander v. City of Minneapolis*, 531 F. Supp. at 1170; *Purple Onion, Inc. v. Jackson*, 511 F. Supp. at 1212, 1217, 1224. Cf. *Bayou Landing, Ltd. v. Watts*, 563 F.2d 1172, 1175 (5th Cir. 1977), cert. denied, 439 U.S. 818 (1978).

²⁶ E.g., *Purple Onion, Inc. v. Jackson*, 511 F. Supp. at 1210; *E&B Enterprises v. City of University Park*, 449 F. Supp. at 697. Cf. *Bayou Landing, Ltd. v. Watts*, 563 F.2d at 1175.

have been upheld only in the Seventh Circuit and have been stricken on various grounds by Circuit courts in the First, Fifth, Sixth, Eighth, and Ninth Circuits.

This case demonstrates only too well the problems faced by cities seeking to limit the effects of adult theatres on their communities, while leaving a reasonable outlet for adult film fare. Before any theatre had entered the city, Renton held lengthy hearings in the democratic fashion, letting all interested residents have their say and following its usual and normal legislative procedures. It studied what had occurred in other jurisdictions, but it tailored its ordinance to fit Renton's particular circumstances. The City Council set forth detailed findings and reasons for its action. Its ordinance did not unduly inhibit speech; instead, it set aside what the District Court found was a "large percentage of land within the city" (App. 27a) for the location of adult theatres and for the showing of their films. Yet Renton's attempt went for naught. The Ninth Circuit, reviewing the District Court's findings *de novo*, struck down Renton's ordinance as unconstitutional. The Court of Appeals was wrong in several crucial respects.

1. Renton Properly Relied on the Experience of Other Cities

The Ninth Circuit erred in ruling that Renton could not rely upon the experience of other cities in enacting its adult theatre zoning ordinance.

Although purporting to rely upon *Young*, the court failed to note that the Detroit ordinance approved in that case was itself based in part upon the experience of other cities. As Justice Powell noted in his concurring opinion, the evidence introduced before the Detroit City Council "consisted of reports and affidavits from sociologists and urban planning experts, as well as some laymen, on the cycle of decay that had been started in areas of other

cities, and that could be expected in Detroit, from the influx and concentration of such establishments." 427 U.S. at 81 n.4 (Powell, J., concurring); emphasis added.²⁷

Moreover, the Ninth Circuit's ruling would effectively prohibit any city from enacting an ordinance in advance of the entry of adult theatres into its environs. A city can hardly rely upon its own experiences unless and until adult theatres build or buy within the city limits and introduce the deleterious effects that the ordinance is designed to obviate in the first instance. Must a city really wait until adult theatres have started the "cycle of decay" that has already been found to evolve in other areas? Nothing in *Young* or any other of this Court's decisions requires such a result.²⁸

This concept is especially pertinent here, where Renton was relying in part upon an ordinance adopted by a city located virtually on its borders. Renton was not reaching out and relying entirely upon the experience of cities located in areas very different from its own—as was at least partially true in *Young* (see n.27, *supra*). Renton, virtually a suburb of Seattle, could legitimately conclude that whatever problems Seattle had encountered would soon be its own—when and if an adult theatre moved into Renton.²⁹

²⁷ Justice Powell's statement was supported by the record in that case. Experts recited their experiences in many different cities and towns in Michigan (Appendix in *Young* at 18-19), New York City (*id.* at 30, 35), and cities in countries as far away as Sweden, Denmark, West Germany, France, Britain and Italy. *Id.* at 32.

²⁸ On the contrary, were a city to await the entry and deleterious effects of adult theatres, it would run the risk encountered by other cities of being accused of drawing its zoning lines with the intent of closing down a particular theatre (or theatres) already operating within its borders. See, e.g., cases cited in n.24, *supra*.

²⁹ Moreover, Renton's ordinance can hardly be said to have imposed an onerous economic burden on Playtime. Any disadvantage it suffered was of its own doing, with full knowledge of the facts. See n. 14, *supra*.

The opinion below imposes an impermissible burden on cities and towns. If they cannot rely upon the experiences of others, they must replicate within their own borders the testimony, exhibits and evidence already introduced elsewhere. Particularly for small cities and towns, such a requirement can be prohibitively expensive and impractical. Again, nothing in this Court's decisions requires such a result, and the facts in *Young* support an opposite conclusion.

The decision below, although supported by language from other Circuits in several other cases,³⁰ is in direct conflict with the Seventh Circuit's decision in *Genusa v. City of Peoria*, *supra*. There, the argument was made that Peoria's ordinance should be struck down because the City had not conducted its own surveys or relied upon its own experiences, but instead had based its conclusions on what had occurred in other cities. The Seventh Circuit rejected that argument:

Even though here, unlike in *Young*, the city has not demonstrated a past history of congregated adult uses causing neighborhood deterioration, we agree with the district court that a city need not await deterioration in order to act. A legislative body is entitled to rely on the experience and findings of other legislative bodies as a basis for action. There is no reason to believe that the effect of congregated adult uses in Peoria is likely to be different than the effect of such congregations in Detroit. [619 F.2d at 1211; footnote omitted.]

The California state courts also disagree with the approach taken by the Ninth Circuit. In one case, for example, a court wrote:

Goldie [an adult book store operator] asserts that the identical ordinance must be tested anew each

³⁰ See, e.g., *Avalon Cinema Corp. v. Thompson*, 667 F.2d at 661-662; see also *CLR v. Henline*, 520 F. Supp. at 767.

time it is enacted by a different governmental entity by establishing the actual existence of local conditions which would justify it. Goldie's thesis would deny to lawmakers in one locale the benefit of the wisdom and experience of lawmakers in another community, no matter how similar the circumstances; it would, as it were, require the reinvention of the wheel countless times over when mere access to common knowledge would render the considerable effort involved unnecessary. [*County of Sacramento v. Superior Court*, 137 Cal. App. 3d at 455, 187 Cal. Rptr. at 158.³¹]

The Ninth Circuit's contrary ruling imposes impermissible and wholly unnecessary burdens on municipal legislative bodies. There is simply no basis for courts setting such arbitrary guidelines for the types of "evidence" a city council may consider in its legislative processes.

2. Renton Set Aside a Permissible Zone for the Location of Adult Theatres

The court below ruled that, even though Renton had effectively set aside 520 acres of land on which adult theatres could locate, this land was constitutionally "unavailable" because a portion of it is presently undeveloped, or is developed for existing commercial uses. App. 13a-14a.

The Ninth Circuit gave no thought to, and made no accommodation for, the problem of small communities. Under its approach, in fact, the more incompatible a

³¹ See also *Ebel v. City of Corona*, 698 F.2d at 392, where the objection that the City Council had not made adequate findings of fact was rejected by the court because the city "gave notice, held hearings, issued a report of the City Planning Commission, and gave reasons for its action in the preamble to the ordinance", and this was all that was required for a "legislative act". Accord, *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d at 1215. Cf. *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d at 1125.

theatre is with the quality of the community, the greater its right to locate there. A small, predominantly residential city or town with a centrally located, modest commercial development will be unlikely to have much space "available" for adult theatres. Yet under the Ninth Circuit's reasoning, it has less power to protect itself than cities like Detroit with more space and many similar uses.

But even if the focus is properly on the practical availability of Renton's own set-aside zone, the Ninth Circuit was wrong. To begin with, it misconstrued the record in important respects. The court cited such properties as the Longacres Racetrack and a city sewage plant as being within the set-aside area, when in fact the racetrack and the plant are clearly and unequivocally *outside* the set-aside area.³² The confusion can only be accounted for by the fact that the court relied on a map, and accompanying testimony, submitted at an early TRO hearing in this case,³³ prior to the time that the permissible distance from schools was reduced from one mile to 1,000 feet. The map also contained a number of errors because it had to be prepared within a few hours' time.³⁴ When the errors were corrected and the ordinance as amended taken into consideration, the set-aside area became substantially different (and larger),³⁵ and many of the "uses" included by the Ninth Circuit fell outside the set-aside area.³⁶ The court's error was particularly egregious

³² See maps at App. 140a-142a.

³³ Cl. test., June 23, 1982, at 77, 84; see Cl. aff., Jan. 27, 1982 (incl. map).

³⁴ Cl. test., June 23, 1982, at 77-85.

³⁵ The TRO testimony, prior to correction, estimated the size of the set-aside area to be approximately 400 acres, with about half of it unoccupied. See Cl. dep., Mar. 3, 1982, at 30-40.

³⁶ Compare map attached to Cl. aff., Jan. 27, 1982, with map attached to Cl. aff., May 26, 1982.

because it treated the District Court's findings as part "law," reviewed them *de novo*, and overturned them.

In addition to its view of the facts, the Ninth Circuit's underlying thesis is fatally flawed. Its approach raises serious concerns of great import to cities and towns throughout the country. The court assumed that unless property is immediately available for purchase from a willing seller, the ordinance has the effect of "suppressing, or greatly restricting access to, lawful speech."³⁷

Even if an ordinance resulting in a "substantial restriction" on the showing of adult films would violate the First Amendment, that is clearly not the case in situations like this one. We begin with the fact that Renton did not set aside a small, restricted area of land. The set-aside area is physically large enough to accommodate more than 400 theatres and surrounding parking lots.³⁸ It constitutes over 4% of all the land in the City (as compared to Seattle's set-aside area of less than 1%).³⁹ Its acreage is larger than one-fourth of the entire area of Renton occupied by single-family residences and exceeds the amount of land in the City used for parks and recreation.⁴⁰ Witnesses for both Renton and Playtime testified that much of the 520 acres is simply unoccupied land, adjoined and criss-crossed by both highways and interior

³⁷ App. 13a n.11 (quoting *Young*, 427 U.S. at 71 n.35).

³⁸ Playtime's own attorney assumed that an adult theatre seating 400 persons would require 6000 sq. feet of space. Cl. dep., Mar. 3, 1982, at 68-72. Renton's Policy Development Director testified that such a building would need 40,000 additional sq. feet for parking, plus or minus 10% for error, or a maximum total of 52,000 sq. feet for the entire theatre area. *Id.* A 520-acre area would encompass 22,651,200 sq. feet, or some 435 theatre areas.

³⁹ Cl. aff., Jan. 27, 1982, at 6. This estimate for Renton was made before the set-aside zone was enlarged by the second ordinance. Therefore, the percentage today would be even larger.

⁴⁰ Cl. aff., Jan. 27, 1982, at 2.

access roads.⁴¹ So long as this land is within reasonable driving distance of the City's populated areas⁴² and physically accessible, why is it not constitutionally "available" for the location of adult theatres? The Court of Appeals does not say. The court does assume, however, that a "fully-developed shopping center" and "a business park containing buildings suitable only for industrial use" are not constitutionally "available".⁴³ This theme apparently follows the approach of Playtime's real estate expert, who testified that much of the land was not "available" because it was occupied, and a number of property owners told him they would not sell to an adult theatre owner.⁴⁴

This approach is wholly specious for two reasons. First, property can be purchased through third parties, with the identity of the true purchaser disguised. But even more importantly, the court's approach gives the adult theatre owner a preferred position above every other potential purchaser of property. He does not have to compete in the marketplace for property like everyone else, including drug stores, hair salons and theatre owners showing regular fare. Even the business offices of the media, also protected by the First Amendment, enjoy no such privilege.⁴⁵ Under the Ninth Circuit's thesis, a city

⁴¹ Cl. aff., May 26, 1982, at 2-3; John. test., June 23, 1982, at 29-31; Cl. test., June 23, 1982, at 54-59, 61-62, 84-85; Cl. test., Jan. 29, 1982 at 16-17, 27, 42-43, 49-50, 51, 53, 56-57, 61-64; And. aff., June 15, 1982, at 4-9.

⁴² The entire land area of Renton consists of only 15.3 square miles. Cl. aff., Jan. 27, 1982, at 1.

⁴³ App. 13a. There was, however, un rebutted testimony that theatres *can* be built in areas designated "industrial park." Cl. test., Jan. 29, 1982, at 60, 63-64.

⁴⁴ And. aff., June 15, 1982, at 5-8.

⁴⁵ Churches, too, must obey zoning laws in the free exercise of their religion and must buy property under the ordinary rules of

must establish the existence of a "turnkey" location for the adult theatre operator; property must stand ready to be sold to such an operator from a willing seller. This reasoning is in direct conflict with the view of those courts (including the Seventh Circuit) which have upheld set-aside areas (*see* n.22, *supra*), and we submit that it was never the intent of this Court in *Young*.

A set-aside zone should be deemed "available" in the constitutional sense when it is accessible—both in terms of distance from populated areas of the city and in terms of internal streets and highways—and when an ordinary theatre operator could build or buy a theatre there at such time as property becomes available in the ordinary course of business. The fact that others have already built or bought within the area should not be a disqualification; to the contrary, it demonstrates that the zone is a frequented, accessible and desirable area. That some present owners express no immediate desire to sell is also not a disqualifying factor; that is a fact of life faced by all potential purchasers.⁴⁶ Owners constantly change their minds, either voluntarily or through the vicissitudes of business life.

In summary, if Renton's set-aside zone is not constitutionally "available," it is fair to say that virtually no

supply and demand. *See American Communications Ass'n v. Douds*, 339 U.S. 382, 397-398 (1950); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307-309 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

⁴⁶ It should be noted, however, that even Playtime's real estate witness could not testify that all property owners within the set-aside zone would not sell. Some owners told him they *would* sell, some said they did not think the property was "suitable" for this use, and he could not reach others. *And. aff.*, June 15, 1982, at 4-9. And even some 22 acres owned by the City is not wholly immune from sale to third parties. In fact, the City Council voted as recently as five months ago that in the future the City would study the possible "purchase, trade or sale" of certain of its property. Minutes, Renton City Council, Sept. 24, 1984, at 1.

small city or town in this country will be capable of setting aside a permissible zone, consistent with its other legitimate interests, for the location of adult theatres. The result of such a development will be loss of control by small cities and towns over the "quality of life" of their communities.

3. The Court of Appeals Erroneously Implied an Improper Legislative Motive

The Ninth Circuit apparently ruled⁴⁷ that the expression by citizens at public hearings of views aimed at the content of adult films raised an inference of an improper motive by the City Council, and that even if this motive was merely "a" motivating factor in its zoning decision, this was enough to invalidate the ordinance. App. 20a. The court erred in several respects.

First, there is a serious question as to whether motive or intent—either of citizens or of the City Council itself—has a part to play in a case like this, where any burden on the adult theatre owner's First Amendment interests is only incidental. When independent legitimate reasons exist for minimal restrictions on First Amendment freedoms, this Court has refused to undertake an analysis of the motivation behind the legislative enactment. *See, e.g. United States v. O'Brien*, 391 U.S. at 383-386. Here, the legitimate reasons relate to the very protection of neighborhoods through zoning approved in *Young*.

But even if motive or intent is relevant, the Court of Appeals was still wrong to second-guess a city council.

⁴⁷ The District Court noted that the City Council had summarized ideas put forth at public hearings, including concerns reflecting citizens' values "which might be impermissible bases for justification of restrictions affecting first amendment interests." App. 31A. The Court of Appeals interpreted this statement as a recognition that "many of the stated reasons [made by the City Council] for the ordinance were no more than expressions of dislike for the subject matter." App. 19a-20a; footnote deleted.

There was no evidence that any member of the City Council had an improper motive. Nevertheless, the court went behind the specific findings of the Council as to why the ordinance was passed. It apparently concluded that because some citizens at an open meeting expressed personal views adverse to the content of adult films, an inference was raised that at least one motive of the Council itself was improper, and this was sufficient to invalidate the entire ordinance.

The court should not have imputed the motives of some citizens to the City Council. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-270 (1977).⁴⁸ The effect of the Ninth Circuit's ruling on city governments would be to cancel hearings preceding the adoption of zoning ordinances, to close them to the public, or to pre-censor approved speakers. None of these results is practical, all are undemocratic, and they may even be unconstitutional in denying citizens their own First Amendment rights to speak. See *City of Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S., 167, 174-176 (1976). Most jurisdictions (including the State of Washington) now require by law that such proceedings be open to the public, precisely so that citizens can express a wide variety of views on the subjects under consideration. City councils should not be held responsible for the fact that some citizens do not like adult films. As a matter of fact, the Ninth Circuit ruling would constitute an invitation to adult theatre owners such as Playtime to induce citizens to appear at hearings and express imper-

⁴⁸ The record in *Young* showed that a number of citizens had complained in that case about content. For example, one Detroit resident whose letter was introduced into evidence complained to the Mayor, "They have pornography available in their back room, and it is disgusting * * *" (Appendix in *Young* at 26), and an attorney for the city conceded: "The concern of the neighborhood over the showing of this kind of movie has been evidenced time and again by picketing, by calls and letters to our office, to the Mayor, to the Common Council and so on." *Id.* at 48.

missible views, thus dooming in advance any subsequently-enacted ordinance, no matter how well intended.

If the motive of a city council—as opposed to speakers at a hearing—is deemed relevant, a court should look to the predominant motive behind the ordinance. An attempt by a court to define "a" single motivating factor behind a legislative act is simply improper.⁴⁹ In this case, all of the City Council's stated reasons were consistent with a concern about *effects*. To the extent that its findings could be said to relate to content, the legislative intent was to oppose not adult films per se but rather the showing of adult films in certain locations. By locating the films nearby, in an accessible and commodious area, the City Council is giving adult films their full play, but without the deleterious effects that evidence has clearly shown will follow if adult theatres are located in all areas of the City.

Finally, even if the City Council's own motives could be said to be based on objectives not heretofore sanctioned by this Court, we respectfully urge that those objectives be approved. It would be ironic indeed if a city could zone adult theatres because of commercial considerations

⁴⁹ In *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984), for example, another panel of the Ninth Circuit held that legislators could not even be questioned about their subjective reasons for passing an ordinance, because the ordinance is to be measured by such objective facts as stated intent and effect. And it was precisely because of this problem of delving into the legislative mind-set that Judge Wallace concurred only in the result in the Ninth Circuit's decision in *Tovar v. Billmeyer*, *supra*. He wrote that the majority, by adopting an "a motivating factor" test (721 F.2d at 1266), was refusing to follow the "clear and precise standard" already adopted by the court in *Ebel v. City of Corona*, 698 F.2d at 393, to the effect that an ordinance is unconstitutional only if its "real purpose" is to obstruct the exercise of protected First Amendment rights. 721 F.2d at 1267 (Wallace, J., concurring). He pointed out that the very nature of the legislative process means that there will always be more than a single purpose for any legislative action. *Id.* at 1268.

such as lowering of residential property values, and not on the ground that these theatres have an unstable and debilitating effect on the families living in those same residences. Such a result would elevate property values over human values. The stability and cohesiveness of families and parents' efforts to raise their children in suitable surroundings free from crime and blighted areas are also worthy of protection. These were precisely the kind of principles that this Court recognized as a valid basis for zoning in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974): "It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clear air make the area a sanctuary for people."⁵⁰

Some of the confusion in regard to legislative intent may have been caused by uncertainty arising out of two of this Court's decisions, *Village of Arlington Heights* and *O'Brien*. *Arlington Heights* dealt with a land area rezoned after a developer contracted to build racially integrated housing. The Court held, on the one hand, that a plaintiff need not prove that the challenged action "rested solely on racially discriminatory purposes," because rarely is a legislature motivated by a single concern. "When there is proof that a discriminatory purpose has been a *motivating factor* in the decision [to rezone], * * * judicial deference is no longer justified." 429 U.S. at 265-266; emphasis added; footnote deleted. On the other hand, the Court held that the mere fact that opponents of integrated housing who spoke at various meetings "might have been motivated by opposition to minority groups" did not invalidate the ordinance. *Id.* at 267-270.

⁵⁰ See also *Berman v. Parker*, 348 U.S. 26, 32-33 (1954); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58-59 (1973) (citizens have legitimate interest in protecting "the style and quality of life" and "the total community environment").

The court below focused upon the "a motivating factor" language in *Village of Arlington Heights* and wholly ignored this Court's holding in that case.

In the second case, *O'Brien*, the Court flatly refused to inquire into legislative motives—an inquiry the Court called "a hazardous matter". The Court ruled that if a statute is otherwise constitutional, courts may look to legislative history for an interpretation of it, but may not void the statute because of perceived intent on the part of some legislators. 391 U.S. at 384.⁵¹ In the instant case, the Ninth Circuit improperly engaged in the "guess-work" eschewed in *O'Brien*.

We respectfully suggest that this Court may have unwittingly given conflicting signals to the lower courts in regard to legislative intent by its decisions in *Arlington Heights* and *O'Brien*. The resulting confusion should now be resolved in the context of attempts by cities to zone adult uses.

4. Cities' Legitimate Attempts to Zone Adult Theatres Are Jeopardized By the Decision Below

In *Young*, this Court was apparently divided over which standard to use in testing the regulation of adult establishments.⁵² A plurality of four treated adult films

⁵¹ See also *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d at 820-830.

⁵² This split has not gone unnoted by the lower courts (see many of the cases in nn.22-26, *supra*) and by the commentators. *E.g.*, Friedman, *Zoning "Adult" Movies: The Potential Impact of Young v. American Mini Theatres*, 28 Hastings L.J. 1293 (1977); Stevenin, *Young v. American Mini Theatres, Inc.: Creating Levels of Protected Speech*, 4 Hastings Const. L. Q. 321 (1977); Aver, *The Zoning of Adult Entertainment: How Far Can Planning Commissions Go?* 5 Comm/Ent. L.J. 293 (1982); Pearlman, *Zoning and the First Amendment*, 16 Urb. Law. 217 (1984); Note, *Content Regulation and the Dimensions of Free Expression*, 96 Harv. L. Rev. 1854 (1983); Note, *Second Class Speech: The Court's Refinement of Content Regulation*, 61 Neb. L. Rev. 361 (1982); Note, *Municipal Zoning Restrictions on Adult Entertainment: Young, Its Progeny and Indianapolis' Special Exceptions Ordinance*, 58 Ind. L. J. 505 (1983).

as meriting a lower level of protection than other films, while Justice Powell reached the same result by application of the *O'Brien* four-part test.

Regardless of which standard is applied, Renton has not violated the First Amendment. Its ordinance is *more* narrowly tailored than that approved in *Young*, because it defines "use" even more restrictively than Detroit did.⁵³ Since its set-aside area is ample to accommodate all of the adult theatres that could possibly want to locate in the city, no suppression of speech has occurred or could occur.⁵⁴

Applying the *O'Brien* test, it is clear that (i) zoning is within the City's constitutional power; (ii) Renton's ordinance furthers its important and substantial governmental interests, including the prevention of decay in residential and commercial areas and the control of crime; (iii) the assertion of its governmental interests is unrelated to the suppression of free expression but instead is closely tailored to the achievement of those interests; and (iv) any incidental restriction on speech is no greater than is essential in furtherance of Renton's governmental

⁵³ The ordinance here requires no separation between adult uses, so that an operator need not consider the character of other uses when locating his business. No special licensing or waiver provisions, with their inherent difficulties of discretion, are included. Likewise, the requirement of continuous exhibition precludes regulation of any incidental or innocent exhibition of sexually explicit material. Renton's ordinance therefore satisfies the concerns expressed by Justice Blackman in his dissenting opinion in *Young*, 427 U.S. at 88-96 (Blackman, J., dissenting).

⁵⁴ This case is thus at the furthest extreme from *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), where nude dancing was entirely prohibited.

This appeal also does not involve any of the issues presented in another case from the State of Washington presently before the Court, *Brockett v. Spokane Arcades, Inc.*, 725 F.2d 482 (9th Cir.), *prob. juris. noted*, 53 U.S.L.W. 3235 (U.S. Oct. 1, 1984) (Nos. 84-28 and 84-143).

interests because the market for expression of adult films is "essentially unrestrained" in view of the existence of 520 acres available for adult theatres.

If Renton's ordinance is not sustained, no such ordinance can withstand scrutiny, and the hope held out in *Young* for a reasonable approach to the serious secondary effects of adult establishments will be dashed for good.⁵⁵ This case, therefore, presents questions of extraordinary importance to small communities throughout the United States. *Young's* progeny demonstrate the confusion of well intentioned courts seeking to implement this Court's rulings. The lower courts, as well as city governments and city planners, need and deserve thoughtful guidance in dealing with the First Amendment's impact on the zoning of adult theatres. Only if the decision below is reversed can cities' efforts to meet this "admittedly serious problem"⁵⁶ be accorded "a sufficient degree of flexibility for experimentation and innovation"⁵⁷ in this vital area of "innovative land-use regulation."⁵⁸

⁵⁵ See cases cited in nn.23-26, *supra*.

⁵⁶ *Young*, 427 U.S. at 71 (plurality opinion).

⁵⁷ *Northend Cinema*, 585 P.2d at 1159.

⁵⁸ *Young*, 427 U.S. at 73 (Powell, J., concurring).

CONCLUSION

For the reasons expressed above, this Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE CITY OF RENTON, *et al.*,
v. *Appellants,*

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

**On Appeal from the United States Court of Appeals
for the Ninth Circuit**

**APPENDIX TO
JURISDICTIONAL STATEMENT**

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 83-3805, 83-3980

PLAYTIME THEATERS, INC.,
a Washington corporation, *et al.*,
Plaintiffs-Appellants,

v.

THE CITY OF RENTON, *et al.*,
Defendants-Appellees.

THE CITY OF RENTON,
a municipal corporation, *et al.*,
Plaintiffs-Appellants,

v.

PLAYTIME THEATERS, INC.,
a Washington corporation, *et al.*,
Defendants-Appellees.

Argued and Submitted May 9, 1984

Decided Nov. 28, 1984

Robert Eugene Smith, Encino, Cal., for Playtime Theaters, Inc.

Lawrence J. Warren, Daniel Kellogg, Warren & Kellogg, Renton, Wash., for City of Renton.

Appeal from the United States District Court
for the Western District of Washington

Before FLETCHER and FARRIS, Circuit Judges, and
JAMESON,* District Judge.

FLETCHER, Circuit Judge:

These consolidated cases are declaratory judgment actions involving the constitutionality of the City of Renton's zoning ordinances regulating the location of adult motion picture theaters.

In case number 83-3805, Playtime Theaters, Inc. ("Playtime") appeals the district court's order denying a permanent injunction and finding that the ordinance furthers a substantial governmental interest, is unrelated to the suppression of speech, and is no more restrictive than necessary to further that interest. Case number 83-3980 is a declaratory action involving the same parties and issues, filed by the City of Renton in state court after federal proceedings had begun. This action was twice removed to federal court and twice remanded to state court. Renton appeals the district court's denial of its motion for fees and costs on the second removal. We reverse in number 83-3805 and affirm in number 83-3980.

I

BACKGROUND

In April, 1981, the City of Renton enacted ordinance number 3526 which prohibited any "adult motion picture theater"¹ within one thousand feet of any residential

* Hon. William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

¹ The first ordinance defined an "adult motion picture theater" as an enclosed building used for presenting motion picture films,

zone or single or multiple family dwelling, any church or other religious institution, and any public park or area zoned for such use. The ordinance further prohibited any such theater from locating within one mile of any public or private school. At the time this ordinance was enacted, no adult theaters were located in Renton, although there were other theaters within the proscribed area.

In January, 1982, Playtime acquired two existing theaters in Renton with the purpose of exhibiting adult motion pictures in at least one, the Renton Theater, which is

video cassettes, cable television, or any other such visual media, distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as hereafter defined, for observation by patrons therein.

The ordinance defined these terms as follows:

2. "Specified Sexual Activities":

(a) Human genitals in a state of sexual stimulation or arousal;

(b) Acts of human masturbation, sexual intercourse or sodomy;

(c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

3. "Specified Anatomical Areas":

(a) Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and

(b) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

The second ordinance expanded the defined term of "used" as:

a continuing course of conduct of exhibiting "specific [sic specified?] sexual activities" and "specified anatomical area[]" in a manner which appeals to a prurient interest.

located within the area proscribed by ordinance number 3526.²

Just prior to closing the sale of the theater, on January 20, 1982, Playtime filed an action in federal court, seeking a declaration that the ordinance was unconstitutional and a permanent injunction against its enforcement.

A month later, on February 19, 1982, Renton brought suit in state court seeking a declaratory judgment that the ordinance was constitutional on its face and as applied to Playtime's proposed use. The complaint alleged that an actual dispute existed because of the pending federal lawsuit and because Playtime asserted that the ordinance was unconstitutional. On February 22, 1982, Renton moved to dismiss Playtime's federal action on the grounds that the federal court should abstain in favor of the state action, citing *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).

On March 8, 1982, Playtime removed the state action to federal court and Renton moved to remand. On March 25, the magistrate filed his recommendation that abstention was improper in the first action and on April 9, he recommended that the removed state action be remanded for lack of jurisdiction because the complaint failed to state a claim upon which relief could be granted. The district court approved both recommendations, denying the motion to dismiss the federal action on May 5, 1982, and remanding the state action on January 13, 1983.

² For the purposes of this opinion, "adult motion picture theater" or "adult theater" refers to the definition used by the City. See *supra* note 1. We express no view as to the effect of this definition on the constitutionality of the ordinance. See *infra* note 18.

On May 3, 1982, Renton passed an emergency ordinance, amending ordinance number 3526. The new ordinance added an elaborate statement of reasons for the enactment of the ordinances,³ it further defined the word

³ The City gave the following reasons in the amended ordinance:

1. Areas within close walking distance of single and multiple family dwellings should be free of adult entertainment land uses.
2. Areas where children could be expected to walk, patronize or recreate should be free of adult entertainment land uses.
3. Adult entertainment land uses should be located in areas of the City which are not in close proximity to residential uses, churches, parks and other public facilities, and schools.
4. The image of the City of Renton as a pleasant and attractive place to reside will be adversely affected by the presence of adult entertainment land uses in close proximity to residential land uses, churches, parks and other public facilities, and schools.
5. Regulation of adult entertainment land uses should be developed to prevent deterioration and/or degradation of the vitality of the community before the problem exists, rather than in response to an existing problem.
6. Commercial areas of the City patronized by young people and children should be free of adult entertainment land uses.
7. The Renton School District opposes a location of adult entertainment land uses within the perimeters of its policy regarding bussing of students, so that students walking to school will not be subjected to confrontation with the existence of adult entertainment land uses.
8. The Renton School District finds that location of adult entertainment land uses in areas of the City which are in close proximity to schools, and commercial areas patronized by students and young people, will have a detrimental effect upon the quality of education which the School District is providing for its students.
9. The Renton School District finds that education of its students will be negatively affected by location of adult entertainment land uses in close proximity to location of schools.
10. Adult entertainment land uses should be regulations [sic] by zoning to separate it from other dissimilar uses just as

any other land use should be separated from uses with characteristics different from itself.

11. Residents of the City of Renton, and persons who are non-residents but use the City of Renton for shopping and other commercial needs, will move from the community or shop elsewhere if adult entertainment land uses are allowed to locate in close proximity to residential uses, churches, parks and other public facilities, and schools.
12. Location of adult entertainment land uses in proximity to residential uses, churches, parks and other public facilities, and schools, may lead to increased levels of criminal activities, including prostitution, rape, incest and assaults in the vicinity of such adult entertainment land uses.
13. Merchants in the commercial area of the City are concerned about adverse impacts upon the character and quality of the City in the event that adult entertainment land uses are located within close proximity to residential uses, churches, parks and other public facilities, and schools. Location of adult entertainment land uses in close proximity to residential uses, churches, parks and other public facilities, and schools, will reduce retail trade to commercial uses in the vicinity, thus reducing property values and tax revenues to the City. Such adverse affect [sic] on property values will cause the loss of some commercial establishments followed by a blighting effect upon the commercial districts within the City, leading to further deterioration of the commercial quality of the City.
14. Experience in numerous other cities, including Seattle, Tacoma and Detroit, Michigan, has shown that location of adult entertainment land uses degrade the quality of the area of the City in which they are located and cause a blighting effect upon the City. The skid row effect, which is evident in certain parts of Seattle and other cities, will have a significantly larger affect [sic] upon the City of Renton than other major cities due to the relative sizes of the cities.
15. No evidence has been presented to show that location of adult entertainment land uses within the City will improve the commercial viability of the community.
16. Location of adult entertainment land uses within walking distance of churches and other religious facilities will have an adverse effect upon the ministry of such churches and

"used,"⁴ and it reduced the required distance from schools from one mile to 1000 feet. The ordinance also contained a clause stating that the federal litigation created an emergency making immediate adoption of the new ordinance necessary.⁵ The ordinance was reenacted on June 14, 1982, without the emergency clause.

will discourage attendance at such churches by the proximity of adult entertainment land uses.

17. A reasonable regulation of the location of adult entertainment land uses will provide for the protection of the image of the community and its property values, and protect the residents of the community from the adverse effects of such adult entertainment land uses, while providing to those who desire to patronize adult entertainment land uses such an opportunity in areas within the City which are appropriate for location of adult entertainment land uses.
18. The community will be an undesirable place to live if it is known on the basis of its image as the location of adult entertainment land uses.
19. A stable atmosphere for the rearing of families cannot be achieved in close proximity to adult entertainment land uses.
20. The initial location of adult entertainment land uses will lead to the location of additional and similar uses within the same vicinity, thus multiplying the adverse impact of the initial location of adult entertainment land uses upon the residential, [sic] churches, parks and other public facilities, and schools, and the impact upon the image and quality of the character of the community.

⁴ See *supra* note 1.

⁵ The emergency clause stated:

The City Council of the City of Renton finds and declares that an emergency exists because of the pendency of litigation against the City of Renton involving the subject matter of this ordinance, and potential liability of the City of Renton for damages as pleaded in that litigation, and that the immediate adoption of this ordinance is necessary for the immediate preservation of public peace [sic], health, and safety or for the support of city government and its existing public institutions and the integrity of the zoning of the City of Renton. There-

On June 23, 1982, the magistrate heard Playtime's motion for preliminary injunction and Renton's motions to dismiss and for summary judgment. On November 5, 1982, he filed his recommendation to deny Renton's motion and to grant Playtime a preliminary injunction. He found that the ordinance "for all practical purposes excludes adult theaters from the City," that only 200 acres were not restricted by the ordinance, and that all of these areas were "entirely unsuited to movie theater use." He further found that Renton had not established a factual basis for the adoption of the ordinance and that the motives behind the ordinance reflected "simple distaste for adult theaters because of the content of the films shown." On January 11, 1983, the district court entered an order approving and adopting these findings and granting a preliminary injunction.⁶ For the first time, Playtime began showing adult movies at the Renton Theater.

On February 8, 1983, the parties entered into a stipulation to submit the case for hearing on whether a permanent injunction should issue on the basis of the record already developed. On February 17, 1983, the district court vacated the preliminary injunction and denied the permanent injunction. The court found that 520 acres were available as potential sites for adult theater use and that this ordinance did not substantially restrict first amendment interests.⁷ The court further held that

fore, this ordinance shall take effect immediately upon its passage and approval by the Mayor.

The City used this clause as justification for a renewed motion to dismiss and a motion for summary judgment, both of which were filed on May 4, the next day.

⁶ We denied the City's application for a writ of mandamus to stay the preliminary injunction.

⁷ The court did not explain the variance between this finding and its prior finding, made at the time it granted the preliminary injunction, that only 200 acres were available.

Renton was not required to show specific adverse impact on Renton from the operation of adult theaters but could rely on the experiences of other cities. Lastly, the court found that the purposes of the ordinance were unrelated to the suppression of speech and that the restrictions it imposed were no greater than necessary to further the governmental interest.

On May 19, 1983, after denial of the permanent injunction, and after the notice of appeal was filed in this court, Renton filed an amended complaint in state court seeking, in addition to the originally requested declaratory relief, abatement of the operation of Playtime's adult theaters. On June 8, 1983, Playtime removed the action to federal court on the ground that Renton sought to enforce statutes that had been declared unconstitutional by this court. The district court remanded because the case did not arise under federal law; the federal issue was only a defense. It denied Renton's motion for costs and fees because it found that the petition raised serious questions of law and that Playtime had not acted in bad faith. Renton appeals the denial of costs and fees.

II

JURISDICTION

Renton argues that abstention was appropriate in this case because it involves vital state interests, *see Railroad Commission v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941), and because the exercise of federal jurisdiction would interfere with the pending state action, *see Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). We do not agree.

A. Pullman Abstention is Inappropriate in This Case.

We recently held that the *Pullman* abstention doctrine was inapplicable in a facial challenge to Washington's anti-obscenity statute. *J-R Distributors, Inc. v. Eiken-*

berry, 725 F.2d 482 (9th Cir. 1984). We recognized that *Pullman* abstention would almost never be appropriate in first amendment cases because such cases involve strong federal interests and because abstention could result in the suppression of free speech. *Id.* at 487-88. Similarly, we find that the district court in the case at hand appropriately declined to abstain because "abstention would not eliminate or materially alter the constitutional issues presented." *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135, 137 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 1022, 102 S.Ct. 557, 70 L.Ed.2d 468 (1981).

B. *Younger Abstention is Inappropriate in This Case.*

We find *Younger* abstention inappropriate as well. Federal courts, concerned for federal-state comity, have employed *Younger* abstention to prevent federal interference with pending state criminal proceedings. *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 469 (9th Cir. 1984); *see also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975). In this case, Renton asked the district court to abstain in favor of a state court action that sought only a declaration of the ordinance's constitutionality.

The cases applying *Younger* abstention have arisen in criminal or quasi-criminal contexts. We have refused to extend *Younger* to civil cases generally. *See Goldie's Bookstore*, 739 F.2d at 469-70; *Champion International Corp. v. Brown*, 731 F.2d 1406 (9th Cir. 1984). We agree with the district court's refusal to do so in this case as well. As we discussed in *Miofsky v. Superior Court*, 703 F.2d 332 (9th Cir. 1983), in each of the cases in which *Younger* has been applied in a civil context, the civil suits "bore similarities to criminal proceedings or otherwise implicated state interests vital to the operation of state government." *Id.* at 337 (emphasis added). These dual requirements are not present in a civil case seeking only declaratory relief.

Playtime did not violate the ordinance prior to challenging it. Thus, it was not even potentially subject to the sort of enforcement action to which *Younger* applies. In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), the plaintiff challenged a local ordinance prohibiting topless dancing in bars. Three bars in the town were affected and all complied with the ordinance prior to commencing suit in federal court. The day after the federal complaint was filed, one bar, M & L, resumed topless dancing and was prosecuted criminally. The other two bar owners remained in compliance. The court held that *Younger* abstention applied to M & L, but the retention of jurisdiction over the other two bar owners was proper because they were not subject to criminal prosecution prior to the issuance of the preliminary injunction. Playtime's position is like that of the two bars in *Doran*.

Playtime showed adult films in Renton for the first time after the district court entered its preliminary injunction. By the time Renton amended its complaint in the state action to include abatement of the nuisance, making it the sort of enforcement action to which *Younger* might arguably apply,⁸ final judgment denying

⁸ In *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), the Supreme Court held that a federal court could not enjoin enforcement of a state judgment in a nuisance abatement action brought by the state against an adult theater. The Court rejected the argument that *Younger* was restricted to criminal proceedings, but carefully limited its holding by recognizing that the state action was "in important respects . . . more akin to a criminal prosecution than are most civil cases. . . . The proceeding is both in aid of and closely related to criminal statutes" *Id.* at 604, 95 S.Ct. at 1208. In *Judice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977), the Court held that *Younger* applied to a state civil contempt proceeding because the state's "interest in the contempt process . . . vindicates the regular operation of its judicial system." *Id.* at 335, 97 S.Ct. at 1217. In *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977), abstention was required in deference to a prior state civil action brought by the state of Illinois to recover welfare pay-

the injunction had already been granted in the district court. At this point, abstention was inappropriate.⁹

III

THE STANDARDS FOR REGULATION OF SPEECH THROUGH THE USE OF THE ZONING POWER

Local governments may zone for the public welfare. See *Berman v. Parker*, 348 U.S. 26, 32-33, 75 S.Ct. 98, 102-103, 99 L.Ed. 27 (1954). The power is considerable

ments obtained by fraud. The Court noted, however, that the action was "an ongoing civil enforcement action . . . brought by the State in its sovereign capacity." *Id.* at 444, 97 S.Ct. at 1918. And, in *Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979), abstention was required as to a pending state proceeding in which the state was seeking custody of children abused by their parents.

⁹ The court in *Huffman* recognized that

"When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles."

Huffman, 420 U.S. at 603, 95 S.Ct. at 1207-1208 (quoting *Steffel v. Thompson*, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974)).

If, however, "state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force." *Hicks v. Miranda*, 422 U.S. 332, 349, 95 S.Ct. 2281, 2292, 45 L.Ed.2d 223 (1975) (emphasis added). In *Hicks*, state officials confiscated allegedly obscene movies and brought an action in state court against two employees of the theater. The theater owners sought injunctive relief in federal court and the day after the owners filed the federal complaint, the state charged the theater owners along with their employees in state court. The court applied *Younger* because "appellees were charged . . . prior to answering the federal case and prior to any proceedings whatsoever before the three judge court." *Id.* at 349-50, 95 S.Ct. at 2292.

but it must be exercised within constitutional limits. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68, 101 S.Ct. 2176, 2182, 68 L.Ed.2d 671 (1981). We have an obligation to scrutinize strictly zoning decisions that infringe first amendment rights. *Tovar v. Billmeyer*, 721 F.2d 1260, 1264 (9th Cir. 1983), cert. denied, — U.S. —, 105 S.Ct. 223, 83 L.Ed.2d 152 (1984).¹⁰

The district court found that 520 acres in Renton were available for adult theater sites. Although we do not quarrel with the conclusion that 520 acres is outside the restricted zone, we do not agree that the land is available.¹¹ A substantial part of the 520 acres is occupied by:

- (1) a sewage disposal site and treatment plant;
- (2) a horseracing track and environs;
- (3) a business park containing buildings suitable only for industrial use;

¹⁰ We note that obscenity is not at issue in this case. The City asks us to take notice of a state superior court decision in *City of Renton v. Playtime Theaters*, No. 82-2-02344-2 (Superior Court, King County, Washington, March 9, 1984), in which an advisory jury ruled that four out of ten movies shown by Playtime are obscene. The City did not argue before the district court that Playtime's movies were obscene. We would not reach the issue in any event since this case does not involve the enforcement of an anti-obscenity statute.

¹¹ Although this circuit has not considered what "available" means in this context, we draw support from the Court's statement in *Young* that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." 427 U.S. at 71 n. 35, 96 S.Ct. at 2453 n. 35. See *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1214 (5th Cir. 1982) (expanding on footnote in *Young*, court noted that permitted locations were "among warehouses, shipyards, undeveloped areas, and swamps.").

- (4) a warehouse and manufacturing facilities;
- (5) a Mobil Oil tank farm; and
- (6) a fully-developed shopping center.

Limiting adult theater uses to these areas is a substantial restriction on speech. Thus, the Renton ordinance, although patterned after the Detroit zoning ordinance upheld in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), is quite different in its effect. The Detroit ordinance prohibited the location of an adult theater within 1,000 feet of another adult theater or other use having similar deleterious effects on neighborhoods, or within 500 feet of a residential area. There was no showing in *Young* that the ordinance seriously limited the number of sites available for adult theaters. The Renton ordinance's prohibition against adult theaters within 1,000 feet of schools, parks, churches, and residential areas would result in a substantial restriction on this activity.

The Supreme Court developed a useful test to measure a challenged regulation affecting speech in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), cited with approval in *Schad*, 452 U.S. at 69 n. 7, 101 S.Ct. at 2183 n. 7. Under this test, a regulation is constitutional only if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the incidental restriction on first amendment freedom is no greater than essential to further that interest. *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679. Here, Renton bears the burden of proving that the elements of this test are satisfied. See *First National Bank v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978).

IV

STANDARD OF REVIEW

The parties stipulated that the record developed at the preliminary injunction stage would serve as the record upon which the court could decide the permanent injunction. The parties in effect submitted the case for trial upon an agreed record, the district court resolving any disputed issues of fact presented by the record.¹² We review these factual determinations under a clearly erroneous standard. We do not, however, apply a clearly erroneous standard of review to the district court's findings on the *O'Brien* factors because our recent decision in *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (en banc), cert. denied, — U.S. —, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984), and the Supreme Court's recent decision in *Bose Corp. v. Consumers Union of United States, Inc.*, — U.S. —, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), require us to review them *de novo*.

¹² In *Starsky v. Williams*, 512 F.2d 109 (9th Cir. 1975), we recognized,

"[W]hile summary judgment cannot be granted where there are questions of fact to be disposed of, even by consent of all concerned, there is no reason why parties cannot agree to try a case upon affidavits, admissions and agreed documents. In effect, that is what was done here. No objection whatever was made at the time of submission that there were questions of fact which could not be decided upon the evidence before the trial court."

Id. at 113 (quoting *Gillespie v. Norris*, 231 F.2d 881, 883-84 (9th Cir. 1956)). This statement applies here as well.

Playtime asserts that summary judgment was improper because it relied on the district court's findings on the preliminary injunction in entering into the stipulation. Thus, Playtime argues, when the district court inexplicably changed its findings of fact, it created material disputed issues of fact that would make summary judgment improper. Although we sympathize with Playtime's argument, we agree with Renton. Playtime made a tactical choice not to submit further documentation or testimony and cannot now complain.

In *McConney* we held that mixed questions of fact and law are subject to *de novo* review when they require us "to exercise judgment about the values that animate legal principles" 728 F.2d at 1202. In no area of law is the consideration of the values behind legal principles more important than when state action threatens to infringe on activity protected by the first amendment.

In *Bose Corp.*, the Supreme Court held that a trial court's finding as to "actual malice" in a libel case was subject to *de novo* review. The question as framed by the Court was "whether the evidence in the record . . . is of the convincing clarity required to strip the utterance of First Amendment protection. . . . Judges . . . must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold" 104 S.Ct. at 1965. The Court recognized that it "has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the protected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* 104 S.Ct. at 1962. We have a similar duty in the case at hand.¹³

V

APPLICATION OF THE O'BRIEN FACTORS

A. *Renton Has Not Shown a Substantial Governmental Interest.*

The record presented by Renton to support its asserted interest in enacting the zoning ordinance is very

¹³ We will not deal with the first factor of *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), in detail, for all agree that such a zoning ordinance is within the constitutional power of the government. See *Berman v. Parker*, 348 U.S. 26, 32-33, 75 S.Ct. 98, 102-103, 99 L.Ed. 27 (1954); see also *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68, 101 S.Ct. 2176, 2182, 68 L.Ed.2d 671 (1981).

thin. The ordinance itself contains only conclusory statements. No record of the public hearing was made or preserved. City officials who attended testified that the hearing was held, but said little else. To uphold the substantiality of the governmental interest, the district court had to justify Renton's reliance on the experiences of other towns and cities, particularly Detroit and Seattle, citing the Seventh Circuit's decision in *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980).

In *Genusa*, the court relied on *Young* to uphold a provision of a zoning ordinance which required, just as the Detroit ordinance did, the dispersal of adult uses. *Id.* at 1211. Although the Renton ordinance purports to copy Detroit's and Seattle's, it does not solve the same problem in the same manner. The Detroit ordinance was intended to disperse adult theaters throughout the city so that no one district would deteriorate due to a concentration of such theaters. The Seattle ordinance, by contrast, was intended to *concentrate* the theaters in one place so that the whole city would not bear the effects of them. The Renton ordinance is allegedly aimed at protecting certain uses—schools, parks, churches and residential areas—from the perceived unfavorable effects of an adult theater.

This court and the Supreme Court require Renton to justify its ordinance in the context of *Renton's* problems—not Seattle's or Detroit's problems. In *Young*, the plurality found that the record disclosed a factual basis for the council's determinations, 427 U.S. at 71, 96 S.Ct. at 2452, and Justice Powell cited "reports and affidavits from sociologists and urban planning experts, as well as some laymen." *Id.* at 81 n. 4, 96 S.Ct. at 2457-58 n. 4 (Powell, J., concurring).¹⁴ Similarly, in the Seattle case,

¹⁴ The Court in *Schad* recognized that ordinances must address particular problems, citing Justice Powell's concurrence in *Young*:

Emphasizing that the restriction was tailored to the particular problem identified by the City Council, [Justice Powell] ac-

the zoning ordinance was the "culmination of a long period of study and discussion." *Northend Cinema, Inc. v. City of Seattle*, 90 Wash.2d 709, 711, 585 P.2d 1153 (1978), cert. denied, 441 U.S. 945, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1979). By contrast, in *Schad*, which invalidated an ordinance prohibiting live nude dancing in the town, the Supreme Court stressed that the Borough had not adequately justified its substantial restriction by evidence in the record. 452 U.S. at 72, 101 S.Ct. at 2184. The Court cited by way of contrast the full record made in *Young*. *Id.*

In *Kuzinich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982), we reversed summary judgment validating a zoning ordinance regulating adult theaters and bookstores in part because of lack of evidence. We said, "While the ordinance here was said to be copied after the Detroit ordinance validated in *Young*, we find very little evidence bearing on the concentration of adult enterprises." *Id.* at 1348. We found that "[c]onclusions alone support the thesis that adult bookstores and movie theaters have any different impact upon traffic and littering than other kinds of businesses have." *Id.* Further, in *Ebel v. City of Corona*, 698 F.2d 390, 393 (9th Cir. 1983), we remanded for "factual findings on the validity of the city's assertions of harm." *Accord Basiardanes v. City of Galveston*, 682 F.2d 1203, 1215 (5th Cir. 1982) (contrasting record in *Young* against "empty" record before it); *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1125 (1st Cir. 1981) (remanding for factual findings to support city's assertions, stating, "the government bears the burden of proving some empirical

knowledge that "[t]he case would have present[ed] a different situation had Detroit brought within the ordinance types of theaters that had not been shown to contribute to the deterioration of surrounding areas."

Schad, 452 U.S. at 72 n. 10, 101 S.Ct. at 2184 n. 10 (quoting *Young*, 427 U.S. at 82, 96 S.Ct. at 2458 (Powell, J., concurring)).

basis for the projections on which it relies."); *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659, 661-62 (8th Cir. 1981) (en banc) (contrasting *Young* and requiring city to present evidence to justify its restriction); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 98 (6th Cir. 1981) (reversing because city's post hoc justifications failed to support ordinance).

As in *Kuzinich*, we find Renton's justifications conclusory and speculative. Renton has not studied the effects of adult theaters and applied any such findings to the particular problems or needs of Renton. The studies done by Detroit on the problems of concentrating adult uses are simply not relevant to the concerns of the Renton ordinance—the proximity of adult theaters to certain other uses. We do not say that Renton cannot use the experiences of other cities as part of the relevant evidence upon which to base its actions, but in this case those experiences simply are not sufficient to sustain Renton's burden of showing a significant governmental interest.

B. Renton Has Not Proved That The Regulation is Unrelated to the Suppression of Speech.

Renton must prove that its zoning decision was "motivated by a desire to further a compelling governmental interest unrelated to the suppression of free expression." *Tovar v. Billmeyer*, 721 F.2d 1260, 1266 (9th Cir. 1983); see also *Lydo Enterprises v. City of Las Vegas*, 745 F.2d 1211, 1214-1215 (9th Cir. 1984).¹⁵ Both the magistrate and the district court recognized that many of the stated

¹⁵ In *Lydo Enterprises v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984), the court, citing *Schad*, 452 U.S. at 67-70, 101 S.Ct. at 2181-2184, and *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679, reaffirmed that an ordinance that restricts free expression must further "a substantial governmental interest unrelated to the suppression of free expression." 745 F.2d at 1215. In that case, in the context of a preliminary injunction, the court held that the plaintiffs had not developed an adequate record to enjoin enforcement of the ordinance.

reasons for the ordinance were no more than expressions of dislike for the subject matter.¹⁶ The record before us raises at least an inference that a motivating factor behind the ordinance was suppression of the content of the speech as opposed merely to regulating the effects of the mode of that speech. See *Tovar*, 721 F.2d at 1266. The record does not reveal that Renton has rebutted the inference. As discussed above, the City had little empirical evidence before it to demonstrate the alleged deleterious effects of adult theaters.

The district court upheld the ordinance on the ground that Renton's *predominate* concerns were legitimate. But that is not the test in this Circuit. Where mixed motives are apparent, as they are here, *Tovar* requires that the court determine whether "a motivating factor in the zoning decision was to restrict plaintiffs' exercise of first amendment rights." *Id.* at 1266 (emphasis added).¹⁷

Neither the facts before the Renton City Council nor those presented to the district court appear to justify the ordinance's restriction on protected expression. Renton has not shown that it was not motivated by a desire to suppress *speech* based on its content.¹⁸ Given the in-

¹⁶ See *supra* note 3.

¹⁷ The *Tovar* test is consistent with other constitutional cases regarding land use decisions. See, e.g., *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977) ("[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" (emphasis added)).

¹⁸ The recent Supreme Court decision in *Members of City Council v. Taxpayers for Vincent*, — U.S. —, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), upholding an ordinance prohibiting the posting of signs on public property, lends support to the result we reach in this case. In *Vincent*, the ordinance applied to *all* signs, regardless of the content of their message. The court noted there was "no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful." *Id.* 104 S.Ct. at 2126.

ferences raised in the record before us, we remand for reconsideration, particularly in light of *Tovar*.

Renton argues, additionally, that even if it has effectively banned adult theaters, the ordinance is constitutional because similar adult theaters exist in nearby Seattle. The Supreme Court rejected such an argument in *Schad* and we reject it here as well. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schad*, 452 U.S. at 76-77, 101 S.Ct. at 2187 (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939)).¹⁹

VI

COSTS AND FEES ON SECOND REMOVAL

In number 83-3980 Renton claims it is entitled to fees under 28 U.S.C. § 1447(c), because the Playtime's second removal was in bad faith.²⁰ We review the court's finding

¹⁹ In view of our holding, we need not address the overbreadth or vagueness issues raised by Playtime. Playtime also argues that the fact that Renton's ordinance is directed only at adult theatres and not other adult uses is a denial of equal protection. We do not denigrate the validity of this issue, but need not reach it.

²⁰ The district court's ruling was oral and no written opinion or docket entry was made. Although Fed.R.App.P. 4(a)(2) validates a notice of appeal filed after announcement of a decision or order, it contemplates the entry of a judgment under Fed.R.Civ.P. 58, 79. No such entry was made in this case; thus, under Rule 4(a)(2), the notice of appeal has no date of entry to which to conform.

Nonetheless we conclude that we have jurisdiction over this appeal under *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978). In *Bankers Trust*, the Supreme Court held that the parties to an appeal could waive Rule 58's separate judgment requirement when the district court clearly evidenced its intent that its order would represent the final decision in the case and the parties did not object to the absence of a separate judgment. *Id.* at 387-88, 98 S.Ct. at 1121-22. We find those factors present here. The remand order was entered in the docket and no further proceedings could have existed in federal court. Neither

of an absence of bad faith under the clearly erroneous standard. See *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1298 (9th Cir.), *cert. denied*, 459 U.S. 990, 103 S.Ct. 346, 74 L.Ed.2d 386 (1982).

Renton stresses that this was the second removal petition, but fails to mention that the first was remanded because the second step of deciding if the case could be removed if it had stated a cause of action. The second removal was on the basis of Renton's amended complaint, which did state a cause of action. This complaint, however, sought enforcement of state laws that had been declared unconstitutional by other courts. Under the circumstances, the district court did not err in finding no bad faith.

VII

CONCLUSION

The City failed to sustain its burden of justifying its ordinance under the test of *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), as applied in similar cases by the Supreme Court and this court. Accordingly, we reverse and remand case number 83-3805 for proceedings consistent with this opinion.

The district court did not clearly err in denying the City's motion for costs and fees in connection with the second removal. Accordingly, we affirm in case number 83-3980.

AFFIRMED in part, **REVERSED** in part, and **REMANDED**.

party has objected to the lack of a separate judgment here. Although the district court's order in *Bankers Trust* was contained in a written opinion, we do not find that fact controlling except as it bears on the clarity of the court's intent. The transcript of the hearing on the remand leaves no doubt as to the district court's intent. Thus, the oral decision was an appealable order.

APPENDIX B

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON

No. C82-59M

PLAYTIME THEATRES, INC., *et al.*,
Plaintiffs,

v.

CITY OF RENTON, *et al.*,
Defendants.

No. C82-263M
(Remanded)

CITY OF RENTON, *et al.*,
Defendants.

v.

PLAYTIME THEATRES, INC., *et al.*,
Plaintiffs,

[Filed Feb. 18, 1983]

ORDER

INTRODUCTION

On January 11, 1983, the Court entered its order approving and adopting the magistrate's report and recommendation and denying defendants' motions to dismiss and for summary judgment, and granting preliminary injunction *pendente lite*. A separate order was entered January 11, 1983 approving and adopting the magistrate's supplemental report and recommendation and granting the motion to remand Cause No. C82-263M to King County Superior Court.

On February 10, 1983, a hearing was had pursuant to the parties' January 31, 1983 Stipulation and Order separating damages claims from plaintiffs' prayer for permanent injunction and submitting the matter to the Court on the evidence considered by Magistrate Sweigert. The Court has considered the evidence that was before the Magistrate, has considered the parties' memoranda, affidavits and oral arguments. Accordingly, the Court rules that abstention would be improper and plaintiffs' prayer for a permanent injunction must be DENIED.

FEDERAL ABSTENTION

The City of Renton argues that the preliminary injunction was improvidently granted, that the permanent injunction must be denied, and that this Court must abstain and dismiss this action for lack of jurisdiction.

Renton supplements its earlier argument and authorities on this issue with *Miofsky v. Superior Court of State of California, et al.*, in No. 80-4589, slip op. (9th Cir. Jan. 3, 1983). Renton argues that *Miofsky* aids the resolution of the abstention issue herein by refining the meaning of the term "vital state interest" without giving it such overbreadth to deprive the federal court of all of its 42 U.S.C. § 1983 jurisdiction. Renton asserts that the city's interest in establishing zones and setting setbacks is a "vital state interest" of the sort that requires

the Court to abstain from acting in the case at bar pending the outcome in State Court on the Complaint for Declaratory Judgment. The *Miofsky* court distinguished the cases cited for abstention:

In each of these cases, the state or an agent of the state was a party to the proceeding deemed insulated from federal court intervention. In addition, each of these civil suits bore similarities to criminal proceedings or otherwise implicated state interests vital to the operation of state government.

Id. at 7. The context of the *Miofsky* suit was a complaint that state court proceedings violated plaintiff's federally protected rights under Section 1983.

Miofsky does little to refine the term "vital state interests" beyond reasoning that abstention is improper in a Section 1983 civil rights action. The Court is unpersuaded that federal abstention would be proper here. "The state judicial proceeding in this case is purely civil in nature, regardless of the importance of the state policies which the city asserts." Magistrate's Supplemental Report and Recommendation at 5. Although zoning, which is the underlying subject matter of the declaratory judgment's suit in state court, may be an important function performed by a city, this alone does not prevent a federal court from scrutinizing the constitutionality of the city's actions. The Court concludes that the state court action is no bar to continue jurisdiction over plaintiff's suit for injunctive relief.

PERMANENT INJUNCTION

I.

In determining the propriety of a permanent injunction, the Court must first find that there is a threatened violation of a legal right which would produce irreparable harm and for which any other remedy would be

insufficient. The hardship must tip in favor of the plaintiff.

Renton's Ordinance, really a series of three ordinances: 3526, 3629, and 3637, is an attempt to preclude the operation of "adult motion picture theatres" in zones which are within 1,000 feet from certain other specified uses or zones. "Adult motion picture theatres" refers to those theatres exhibiting films characterized by an emphasis on matter relating to "specified sexual activities" or "specified anatomical areas" as a "continuing course of conduct . . . in a manner which appeals to a prurient interest." The subject matter of the films is given a detailed definition, but the "continuing course of conduct" language is not. The ordinance in its essential features is virtually identical to the ordinances in *Young v. American Mini Theatres*, 427 U.S. 50 (1976) and *Northend Cinema, Inc. v. City of Seattle*, 90 Wash. 2d 709, 585 P.2d 1153 (1978) except that the word "used" in describing "adult motion picture theatre" is defined with the "continuing course of conduct" language.

A first amendment interest is affected. The ordinance deals not with obscene material, but sexually explicit material. It is concerned with the exhibition of films inside the theatre and not with "pandering," "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." *Pinkus v. United States*, 436 U.S. 293, 303 (1978).

II.

Since expression protected by the first amendment is the subject of Renton's ordinance, the next inquiry is whether there is actual intrusion upon this first amendment interest and if so, the nature of the intrusion.

There is some intrusion: in certain areas of Renton, films described in the ordinance may not be shown as a continuing course of conduct in a manner which appeals

to a prurient interest. This intrusion is not substantial under the circumstances for several reasons. Renton's restrictions are slightly narrower than those in the cases cited *supra*, because of the "continuing course of conduct" language. No theatre had to be closed under Renton's ordinance, for no theatres were operating or were considering operating when it was enacted. There is no content limitation on the creators of adult movies. The 520 acres of land in all stages of development available for location adult theatres (David R. Clemens Affidavit of May 27, 1982, un rebutted, and his June 23, 1982 testimony at 36-41) belies there being substantial intrusion upon plaintiffs' first amendment right. The real question is whether in spite of the acreage available to plaintiffs to locate a theatre, the economic impact results in a substantial, impermissible effect upon first amendment rights.

Young notes that "the inquiry for first amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression." 427 U.S. at 78 (Powell, J., concurring).

The effect of Renton's ordinance is that plaintiffs or others wishing to exhibit adult film fare and not having a theatre already built and ready for occupancy, must consider whether demand is such that construction of a theatre is feasible. This impact is no different than that upon other land users who must work with what land is available to them in the city. With a large percentage of land within the city available to plaintiffs, the financial feasibility of the various locations is for them to analyze. To conclude otherwise would be to place a burden on the city that Constitutional analysis does not require. Moreover, the message of no individual or group has been silenced. The number of such establishments has not been reduced because none existed and none were attempting to establish themselves in Renton prior to the ordinance. The ordinance merely specifies where adult

theatres may not locate and in doing so, stifles no expression. See, *Young*, 427 U.S. at 81, n.4 (Powell, J., concurring).

The Court concludes that there is not a substantial intrusion upon first amendment interests. Plaintiffs are not virtually excluded from Renton by being confined to the "most unattractive, inaccessible, and inconvenient" areas. But see *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1214 (5th Cir. 1983) Renton's exhibits, affidavits, memoranda, and oral argument persuade the Court that acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads cannot be so characterized. Significant cited cases to the contrary are distinguishable: *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (live entertainment including nude dancing was not a permitted use, and concerns such as trash, police protection, and medical facilities were not sufficient justifications for the exclusion). *Basiardanes* (available sites much less desirable than in Renton, and the zoning ordinance was passed after the theatre was leased for showing adult films); *Avalon Cinema Corporation v. Thompson*, 667 F.2d 659 (8th Cir. 1981) (zoning ordinance enacted after suggested adult use); *Keego Harbor Co. v. of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981) [*sic*] (no location within city that was not within 500 feet of a bar or other regulated use). Ample, accessible real estate is available for the location of adult theatres in Renton.

III.

The insubstantial intrusion upon first amendment interests by Renton's ordinance must be considered against the governmental interest which led to its enactment. Under the four-part test of *United States v. O'Brien*, 391 U.S. 367, 377 (1968), a governmental regulation is justi-

fied despite incidental impact upon first amendment interests

1. If it is within the constitutional power of the government,
2. If it furthers an important or substantial governmental interest,
3. If the governmental interest is unrelated to the suppression of free expression, and
4. If the governmental restriction is no greater than necessary for the furtherance of that interest.

As in *Young*, the first two elements of the test are met. The ordinance was within the City of Renton's power to enact. Nor is there any doubt that the interests sought to be furthered by this ordinance are important and substantial.

Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values. While I agree with respondents that no aspect of the police power enjoys immunity from searching constitutional scrutiny, it also is undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps "the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Village of Belle Terre v. Boraas*, 416 U.S., at 13 (Marshall, J., dissenting).

Young, 427 U.S. at 80 (Powell, J., concurring). The critical inquiries are whether these interests are furthered by the ordinance and whether the governmental interest is unrelated to the suppression of free expression, element three.

Renton's interests, articulated in the ordinance, "in protecting and preserving the quality of its neighborhoods, commercial districts, and the quality of urban life through effective land use planning," are furthered by the ordinance. The ordinance states in item 14, p. 3, Nos. 3629 and 3637:

14. Experience in numerous other cities, including Seattle, Tacoma and Detroit, Michigan, has shown that location of adult entertainment land uses degrade the quality of the areas of the City in which they are located and cause a blighting effect upon the city. The skid row [sic] effect, which is evident in certain parts of Seattle and other cities, will have a significantly larger affect upon the City of Renton than other major cities due to the relative sizes of the cities.

There was no evidence adduced to show that the secondary effects of adult land uses would be different or lesser in Renton than in Seattle, Tacoma, or Detroit. Certainly, Renton must justify its ordinance, but in so doing, experiences of other cities and towns must constitute some evidence to the legislative body considering courses of action. *Genusa v. City of Peoria*, 619 F.2d 1203, 1211 (7th Cir. 1980). If the goal of preservation of the quality of urban life is to have any meaning, a city need not await deterioration in order to act. *Id.* The observed effects in nearby cities provides persuasive circumstantial evidence of the undesirable secondary effects Renton seeks to preclude from within 1,000 feet of residential zones, schools, religious facilities, and public parks. Although the effects in other cities are starkly shown when adult uses are congregated, Renton need not await such congregation. Similarly, no negative inference can be drawn from Renton's choosing to address only one form of "adult" usage. It's [sic] effort would have been bolstered by considering other "adult" uses in view of other cities' experiences, but inclusion of these other

"adult" uses is not mandatory. The city being aware that it is treading in a delicate area between valued interests might understandably be loath to tackle the description, restriction, and rationale of more than one such usage at a time. "[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young*, 427 U.S. at 71.

The governmental interest is unrelated to the suppression of free expression, and the third element is satisfied. Concern with preventing undesirable secondary effects is not the kind of apprehension aimed at regulating the content of an adult theatre's exhibitions. Rather, it is a permissible classification based on deleterious secondary effects. *Young*, 427 U.S. at 70, 71.

Renton solicited testimony through its City Council and the Council's Planning and Development Committee. It summarized some ideas put forth at those public meetings in its ordinance. Predictably, some citizens expressed concerns reflecting their values which might be impermissible bases for justification of restrictions affecting first amendment interests. See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (overbroad effort to protect privacy interests of certain citizens from "offensive" speech—nude movie fare visible from public street). The inclusion of these statements should not negate the legitimate, predominate concerns of the City Council nor lessen the value of the circumstantial evidence of adult land uses' effects in nearby cities. Arguably, some of the statements may be construed as characterizations of the community's quality of life that is presently sought to be preserved. Citizens' judgments as to a city's quality of life is [sic] necessarily subjective. It is necessary to separate these subjective characterizations of the city's quality of life from the goals of protecting and preserving it and the evidence that the means will further the end. Renton could have written its ordinance

in such a way as to better distinguish these aspects of the problem, but this is not a material consideration.

Finally, part four of the *O'Brien* test is satisfied for the restriction is no greater than necessary to further the governmental interest. The 1,000-foot aspect of the restriction does not preclude adult theatres from locating anywhere in the city as in *Keego Harbor*. Renton's ordinance is similar to others that have been upheld except for the "continuing course of conduct" language discussed earlier which has some narrowing effect.

Renton's effort to preserve the quality of its urban life by enacting an ordinance which regulates adult theatre location is minimally intrusive of a particular category of protected expression described in *Young* as being of "a lesser magnitude than the interest in untrammelled political debate." 427 U.S. at 70. Renton's effort under the circumstances is not unconstitutional under the first amendment. Injunctive relief from enforcement of the ordinance would be improper. NOW, THEREFORE,

For the foregoing reasons, the Court having reconsidered its de novo review which led to the entry of the preliminary injunction, the order granting preliminary injunction must be vacated as improvidently granted, and plaintiffs' prayer for permanent injunction against enforcement of the ordinance is DENIED. Accordingly, the City of Renton's Motion to Dismiss for Lack of Jurisdiction is DENIED, and its Motion for Summary Judgment is GRANTED.

SO ORDERED.

DATED this 17th day of February, 1983.

/s/ Walter T. McGovern
WALTER T. MCGOVERN
Chief
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

Civil Action Docket No. C82-59M

PLAYTIME THEATRES, INC., *et al.*

— vs. —

CITY OF RENTON, *et al.*

JUDGMENT

This action came on for (hearing) before the court, United States District Judge Walter T. McGovern presiding. The issues having been duly (heard) and a decision having been duly rendered, it is ordered and adjudged that plaintiffs' prayer for permanent injunction is DENIED, City of Renton's motion to dismiss for lack of jurisdiction is DENIED and City of Renton's motion for summary judgment is GRANTED.

[Filed Feb. 18, 1983]

Dated at: Seattle, Washington

Date: 18 February 1983

/s/ [Illegible]
For the Court

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C82-59M

PLAYTIME THEATERS, INC.,
a Washington corporation, *et al.*,
v. *Plaintiffs,*THE CITY OF RENTON, *et al.*,
Defendants.

[Filed Apr. 29, 1983]

ORDER DENYING PLAINTIFF'S MOTIONS TO
ALTER AND AMEND JUDGMENT AND FOR
STAY PENDING APPEAL

THE COURT having considered all the material relevant to Plaintiff's motions to alter and amend judgment and for stay pending appeal, including the parties' briefs, concludes that its judgment should remain as earlier entered. NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiff's Motion to Alter and Amend Judgment is DENIED, and its Motion for a Stay Pending Appeal is DENIED.

DATED this 29th day of April, 1983.

/s/ Walter T. McGovern
WALTER T. MCGOVERN
Chief
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C82-59M

PLAYTIME THEATRES, INC., *et al.*,
v. *Plaintiffs,*CITY OF RENTON, *et al.*,
Defendants.

Case No. C82-263M

CITY OF RENTON, *et al.*,
v. *Plaintiffs,*PLAYTIME THEATRES, INC., *et al.*,
Defendants.

[Filed Jan. 13, 1983]

ORDER DENYING DEFENDANTS' MOTIONS TO
DISMISS AND FOR SUMMARY JUDGMENT AND
GRANTING PRELIMINARY INJUNCTION
PENDENTE LITE

The Court, having considered plaintiffs' motion for preliminary injunction, defendants' renewed motion to dismiss and motion for summary judgment, the Report and Recommendation of United States Magistrate Philip K. Sweigert, and the balance of the records and files herein, does hereby find and ORDER:

(1) Said Report and Recommendation is hereby approved and adopted;

(2) Defendants' motion for summary judgment and renewed motion to dismiss and [*sic*] hereby DENIED;

(3) Defendant City of Renton, its officers, agents, servants, employees, successors, attorneys, and all those in active concert or participation with them, are enjoined from enforcing City of Renton Ordinance No. 3637 against plaintiffs, said preliminary injunction to remain in effect pending a decision by this Court on the merits and until further order of the Court; and,

(4) The Clerk of Court is to direct copies of this Order to all counsel of record and to Magistrate Sweigert.

DATED this 11th day of January, 1983.

/s/ Walter T. McGovern
Chief
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Case No. C82-59M

PLAYTIME THEATRES, INC., *et al.*,
Plaintiffs,

v.

CITY OF RENTON, *et al.*,
Defendants.

Case No. C82-263M

CITY OF RENTON, *et al.*,
Plaintiffs,

v.

PLAYTIME THEATRES, INC., *et al.*,
Defendants.

REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

On February 23, 1982, the Court, approving and adopting a Report and Recommendation filed February 3, 1982 (Dkt. #22), entered an order denying plaintiffs' motion for temporary restraining order (Dkt. #39).

Three motions are presently before the Court: First, plaintiffs' motion for preliminary injunction, second, defendants' renewed motion to dismiss, and, third, defendants' motion for summary judgment. At a hearing conducted on June 23, 1982, the undersigned heard oral testimony, received documentary evidence, and heard the arguments of counsel with respect to all three motions. Based thereon and upon the affidavits and the balance of the record before me, and for the reasons set forth herein in some detail, I conclude that plaintiffs have established both a clear likelihood of success on the merits and irreparable injury. I recommend that the Court enjoin enforcement of Renton's zoning ordinance dealing with adult theatres. I also, of course, recommend denial of defendants' dismissal and summary judgment motions.

THE RECORD BEFORE THE COURT

(A) *The Ordinances.*

In April of 1981, the City of Renton enacted Ordinance No. 3526 providing that adult motion picture theatres as defined therein were prohibited:

- (1) Within or within 1,000 feet of any residential zone or single family or multiple family use;
- (2) Within one mile of any public or private school;
- (3) Within 1,000 feet of any church or other religious facility or institution; and,
- (4) Within 1,000 feet of any public park or P-I zone.

Early in 1982, plaintiffs acquired two existing theatre buildings in the City of Renton. It was their intention to show feature length sexually explicit adult films in one of them. The theatre buildings, however, were located in an area proscribed by Ordinance No. 3526, prompting plain-

tiffs to commence the present action seeking damages and an injunction prohibiting enforcement of the ordinance on due process, First Amendment, and equal protection grounds. Their principle contentions are that the City of Renton failed to factually support a sufficient governmental interest justifying intrusion upon protected speech and that the ordinance was not a mere locational restriction but a virtual prohibition of adult theatres in the City of Renton.

While the case was pending, more specifically in May, 1982, defendant City of Renton enacted Ordinance No. 3629, which amended Ordinance No. 3526. The principle changes were:

- (1) The amending ordinance contained an elaborate statement of the reasons for enacting both Ordinance No. 3526 and Ordinance No. 3629;
- (2) A definition of the word "used" was added;
- (3) Violation of the use provisions of the ordinance was declared to be a nuisance *per se* to be abated civilly and not by criminal enforcement;
- (4) The required distance of an adult theatre from a school was reduced from one mile to 1,000 feet; and,
- (5) A severability clause was added.

The amending ordinance, No. 3629, also contained an emergency clause and was to be effective as of the date of its passage and approval by the mayor, May 3, 1982.

On June 14, 1982, defendants passed yet a third ordinance, No. 3637, which was identical to Ordinance No. 3629 in all respects except that the emergency clause was deleted and the ordinance was to become effective thirty days following its publication.

While plaintiffs argue that the only ordinance before the Court is No. 3526, they are clearly incorrect. Their

request for injunctive relief obligates the Court to consider any and all changes in the applicable zoning scheme to the date of its ruling.

(B) *Events Leading to Passage of the Ordinances.*

The City of Renton presently has no theatres which exhibit sexually explicit adult films. It appears that in May of 1980, at the suggestion of a City of Renton hearing examiner, the mayor suggested to the City Council that they consider the advisability of passing zoning legislation dealing with adult entertainment uses, specifically "adult theatre[s], bookstore[s], film and/or novelty shop[s]" prior to the time any such businesses might seek to locate in the city. The mayor's memorandum suggested that some cities had experienced difficulties in "re-doing" their zoning ordinances once such uses were established in the community.

On March 5, 1981, the Planning and Developing Committee of the Council held a meeting for the purpose of taking public testimony on the subject. While there is no record of that meeting, Mr. Clemens, then the City's acting Planning Director who was present at the meeting, testified that the Superintendent of Schools, and the President of the Renton Chamber of Commerce spoke to concerns about adverse affects which adult entertainment uses would have upon the economic health of Renton's businesses and upon children going to and from school. He also testified that other citizens spoke generally about the adverse affects of such uses. Mr. Clemens further testified that he and his department reviewed the decisions of the Washington State Supreme Court in *North-end Cinemas v. Seattle*, 90 Wn. 2d, 709, and of the United States Supreme Court in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), and presented the information from their review to the Planning and Development Committee. He indicated generally that review of those cases

indicated that adult entertainment uses tend to decrease property values and increase crime.

On April 6, 1981, the Planning and Development Committee of the Council recommended that an appropriate zoning ordinance be written to reflect the following conditions:

"(a) No adult motion picture theatre will be allowed in an area used or zoned residential or in any P-I public use area.

"(b) A suitable buffer strip of 1,000 feet from any residential or P-I area also be a banned area;

"(c) The area enclosed in a one mile radius of any school (this is the minimum student walking distance) would also be a banned area."

Ordinance No. 3526 was the result.

(C) *The Effect of the Ordinance.*

While the record would indicate that there are some 200 acres of property within the city limits of Renton where an adult theatre might conceivably locate, the testimony and affidavits show that, with but one exception, none of that property would be suitable for the location of a theatre. The area is largely undeveloped and what development there is is entirely unsuitable for retail purposes in general and for theatre purposes in particular. The developed areas include:

(1) A Metro sewage disposal site and treatment plant;

(2) Longacres Racetrack and environs;

(3) A business park containing buildings suitable only for industrial use;

(4) Warehouse and manufacturing facilities;

- (5) A Mobile Oil tank farm; and,
- (6) A fully developed shopping center.

The entire area potentially available for the location of an adult theatre is far distant from the downtown business district, not well lit during night time hours, and also generally devoid of pedestrian and vehicular traffic during such hours.

The two sites which are potentially suitable are fully developed and occupied by fast food restaurants.

DISCUSSION

As indicated in my prior Report and Recommendation, the party requesting injunctive relief must clearly show either: (1) probable success on the merits and possible irreparable injury, or (2) sufficient serious questions as to the merits to make them a fair ground for litigation and a balance of hardship tipping decidedly in favor of the party seeking relief. *Los Angeles Memorial Coliseum Commission v. N.F.L.*, 634 F. 2d 1197 (9th Cir. 1980). I conclude that plaintiffs meet the foregoing test.

(1) Probability of Success on the Merits.

A city's authority to zone is a well recognized aspect of the police power. But when a zoning ordinance infringes upon speech protected by the First Amendment, it must be narrowly drawn to further a substantial government interest. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *Kuzinich v. County of Santa Clara*, — F. 2d —, No. 81-4460 Ninth Circuit slip op. October 12, 1982. The City of Renton's zoning ordinance relating to adult theatres plainly implicates First Amendment rights. It is not limited to motion picture theatres catering to those with an appetite for obscene films falling outside the protections of the First Amendment, *Miller v. California*, 413 U.S. 15 (1973). Rather, patterned upon the

ordinance approved in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), it regulates sexually explicit but nonobscene films as well.

Defendant City of Renton contends, however, that no First Amendment rights are involved because the ordinance only regulates the time, place, and manner of the operation of adult theatres. It relies on *American Mini Theatres, supra*. However, I believe the ordinance in *American Mini Theatres* is clearly distinguishable. The ordinance in the instant case, for all practical purposes, excludes adult theatres from the City of Renton and therefore greatly restricts access to lawful speech. The ordinance approved in *American Mini Theatres* had no such effect.

Defendants contend that the City has provided an area within which adult theatres may locate. However, while in theory such area is available, in fact, the area is entirely unsuited to movie theatre use. Restricting adult theatres to the most unattractive, inaccessible, and inconvenient areas of the city has the effect of suppressing or greatly restricting access to lawful speech. *American Mini Theatres, supra*, 427 U.S. at 71 n. 35. See *Basardanes v. City of Galveston*, 682 F. 2d 1203 (5th Cir. 1982); *Avalon Cinema Corporation v. Thompson*, 667 F. 2d 659 (18th Cir. 1981); *Keego Harbor Co. v. City of Keego Harbor*, 657 F. 2d 94 (6th Cir. 1981); *Alexander v. City of Minneapolis*, 531 F. Supp. 1162 (N.D. Minn. 1982); *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981); *Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696 (M.D. Fla. 1978); *E & B Enterprises v. City of University Park*, 449 F. Supp. 695 (N.D. Tex. 1977); cf. *Deerfield Medical Center v. City of Deerfield Beach*, 661 F. 2d 328 (5th Cir. 1981).

Because the Renton ordinance drastically impairs the availability in Renton of films protected for adult viewing by the First Amendment, it must be reviewed under the stringent standards of *Schad, supra*. *Schad* directs

the court to examine the strength and legitimacy of the governmental interest behind the ordinance and the precision with which it is drawn. Unless the governmental interest is significant and is advanced without undue restraint on speech, the ordinance is invalid. *Schad*, 452 U.S. at 70.

The City of Renton has asserted that it has a substantial governmental interest in zoning restrictions which will prevent deterioration of its neighborhoods and its downtown areas. But it is not sufficient to assert such interest. The City must establish a factual basis for its asserted reasons and that it considered those facts in passing the ordinance. Those reasons must be unrelated to the suppression of free expression. *United States v. O'Brien*, 391 U.S. 367 (1968); *Kuzinich v. County of Santa Clara*, *supra*.

Many of the conclusory statements of the reasons for enacting the Renton ordinances reflect simple distaste for adult theatres because of the content of the films shown. Those statements directed at legitimate fears such as prevention of crime and deterioration of business and residential neighborhoods are based principally upon the Planning Departments review of other court cases in which zoning legislation regulating the location of adult businesses has been approved. The City had little or no empirical evidence before it when the initial ordinance was passed. More is required. *Avalon Cinema Corporation v. Thompson*, *supra*; *Keego Harbor Co. v. City of Keego Harbor*, *supra*; *Basiardanes v. City of Galveston*, *supra*. I conclude that the manner in which the ordinance was enacted, its narrow focus on adult theatres to the exclusion of other adult entertainment uses which would presumably contribute to the same concerns, and the fact that most of the findings set forth in the amendatory ordinance reflect citizen distaste for adult theatres because of the film fare shown, suggests an improper motive.

Even assuming that the City has established a substantial governmental interest, however, the ordinance will not pass constitutional muster. The ordinance must be narrowly drawn to serve that interest with only a minimum intrusion upon First Amendment freedoms. *Schad*, *supra*. Here the intrusion upon First Amendment expression is not minimal. Adult theatres are, for all practical purposes, excluded from the City of Renton. The ordinance constitutes a prior restraint on speech and should be held to be unconstitutional.

(2) *Irreparable Injury.*

Irreparable injury is clear. Plaintiffs may not exhibit sexually explicit adult films without being subjected to civil abatement proceedings. The loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable injury in the context of a suit for injunctive relief. *Elrod v. Burns*, 427 U.S. 373 (1976); *Deerfield Medical Center v. City of Deerfield Beach*, *supra*; *Citizens for a Better Environment v. City of Park Ridge*, 567 F. 2d 689 (7th Cir. 1975).

I recommend that the Court enjoin enforcement of City of Renton Ordinance No. 3637 pending disposition on the merits. A proposed form of Order accompanies this Report and Recommendation.

DATED this 5th day of November, 1982.

/s/ PHILIP K. SWEIGERT
United States Magistrate

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

 No. C82-59M

PLAYTIME THEATRES, INC.,
a Washington corporation,
and
KUKIO BAY PROPERTIES, INC.,
a Washington corporation,
Plaintiffs,
v.

THE CITY OF RENTON, *et al.*,
Defendants.

 [Filed Feb. 23, 1982]

ORDER

THIS MATTER came on to be heard before the undersigned judge of the above-entitled Court upon plaintiffs' objections to the February 3, 1982 Report and Recommendation of United States Magistrate Philip K. Sweigert in the above-entitled cause. That Report and Recommendation is on file herein.

This Order is based upon the complete record and files herein, including but not being limited to the affidavits of Gary F. Kohlwes, David R. Clemens and Jack R. Burns, together with a transcript of the testimony of David R. Clemens produced before said U.S. Magistrate on January 29, 1982.

Having considered de novo each and all of the foregoing, together with plaintiff's Motion for a Temporary Restraining Order, the response thereto and the Reports and Recommendation of the United States Magistrate, now, therefore, it is hereby ORDERED

(1) Said Report and Recommendation is hereby approved and adopted;

(2) Plaintiffs' Motion for Temporary Restraining Order is hereby DENIED; and,

(3) The Clerk is to direct copies of this Order to all counsel of record and to Magistrate Sweigert.

DATED this 23rd day of February, 1982.

/s/ Walter T. McGovern
WALTER T. MCGOVERN
Chief
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C82-59M

PLAYTIME THEATRES, INC., *et al.*
v. *Plaintiffs,*
THE CITY OF RENTON, *et al.*,
Defendants.

[Filed Feb. 23, 1982]

JUDGMENT

This matter having come on for consideration before the Court, Honorable Walter T. McGovern, Chief United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, adopting and approving report and recommendation of the Magistrate and denying plaintiffs' motion for Temporary Restraining Order,

IT IS HEREBY ORDERED AND ADJUDGED, that plaintiffs' motion for a Temporary Restraining Order is hereby DENIED.

DATED this 23rd day of February, 1982.

/s/ John A. McLellan
Deputy
United States District Clerk

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C82-59M

PLAYTIME THEATRES, INC.,
a Washington corporation,
and
KUKIO BAY PROPERTIES, INC.,
a Washington corporation,
v. *Plaintiffs,*
THE CITY OF RENTON, *et al.*,
Defendants.

REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Plaintiffs, Playtime Theatres, Inc., and Kukio Bay Properties, Inc., recently acquired two existing theatre buildings in the City of Renton and wish to commence showing feature length sexually explicit adult films in one of them. The theatre buildings are located in areas not zoned for such use. Plaintiffs filed the instant suit claiming that the Renton zoning ordinance in question is unconstitutional for a number of reasons. Because plaintiffs wished to commence showing the adult films on Friday, January 29, 1981, they sought a temporary restraining order prohibiting the City of Renton from enforcing its ordinance. The matter was referred to me by Order of

Reference dated January 22, 1982, and a hearing was held on January 29, 1982. Having heard the arguments of counsel and considering the affidavits and limited testimony and documentary exhibits admitted at that hearing, I recommend that the Court deny the request for a temporary restraining order for the reasons hereinafter set forth.

DISCUSSION

In this Circuit, the party requesting injunctive relief must clearly show either: (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions as to the merits to make them a fair ground for litigation and a balance of hardship tipping decidedly in favor of the party seeking relief. *Los Angeles Memorial Coliseum Commission v. N.F.L.*, 634 F. 2d 1197 (9th Cir. 1980). Further, federal courts should proceed with caution and restraint when considering a facial challenge to the constitutionality of an ordinance. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). Finally, the Court must also bear in mind that a temporary restraining order is ordinarily for the purpose of maintaining the last uncontested status quo between the parties until full hearing of an application for preliminary injunction can take place.

The ordinance in question provides that adult motion picture theatres as defined therein are prohibited:

- (1) Within or within 1000 feet of any residential zone or single family or multiple family use;
- (2) Within one mile of any public or private school;
- (3) Within 1000 feet of any church or other religious facility or institution; and
- (4) Within 1000 feet of any public park or P-I zone.

Plaintiffs' complaint challenges the constitutionality of the ordinance on the following grounds: First, they claim

that certain definitional sections are so vague and overbroad as to deny them due process. Second, they claim that confinement of adult theatres to certain areas is an impermissible prior restraint on protected First Amendment speech. Third, they argue the classification of theatres based on the content of the films shown violates First Amendment and equal protection guarantees. Plaintiffs did not pursue their vagueness or overbreadth arguments at the hearing or in their brief but focused only on the First Amendment and equal protection claims.

Defendants contend that the ordinance is not facially invalid for vagueness or overbreadth but is a reasonable regulation of the place in which "adult motion picture theatres" may be located within Renton and has only an incidental effect upon exercise of First Amendment rights. Defendants rely principally on *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L.Ed. 2d 310 (1976), *re-hearing denied*, 429 U.S. 873 (1976) (hereinafter referred to as *Young*).

In *Young*, the Supreme Court approved the creation and definition of an adult theatre zoning use in the City of Detroit which was clearly identical to the Renton zoning use at least in its definitional provisions. The Court also approved regulation of location of that use. The Court reasoned that since the ordinance only controlled the location of adult businesses and did not restrict the content of the speech disseminated therein, it was merely a time, place, or manner restriction. *Id.* at 63, 71. The Court held that the City had a strong governmental interest in protecting the quality of its neighborhoods, *Id.* at 71, 72, which justified the zoning scheme which classified businesses on the content of their material, and treated adult businesses (including theatres) different from other businesses.

The Court indicated in *Young*, however, that the "situation would have been quite different if the ordinance

had the effect of suppressing, or greatly restricting access to, lawful speech." *Id.* at 71 n. 35. Accordingly, the critical inquiry is the "effect" the ordinance's limitations have on the exercise of First Amendment rights.

In their affidavits and through the limited testimony and exhibits admitted at the hearing, plaintiffs have attempted to distinguish the Renton ordinance from that approved in *Young* in two respects: First, they contend that the City of Renton failed to factually support its conclusion that adult movie theatres have an adverse effect on residential neighborhoods including incidental amenities close thereto such as parks, churches, and schools—thus the city established no important state interests justifying its intrusion upon protected speech. Second, plaintiffs attempted to show that rather than a mere locational restriction, the Renton ordinance amounts to a virtual prohibition of adult theatres in that city—that even though there may be property available, it is not commercially feasible. I will address these contentions separately.

(1) *Basis for the City's Ordinance.*

The affidavit submitted by Mr. Clemens, the Policy Development Director of the City of Renton, and his testimony at the hearing, indicated that the ordinance in question was only adopted after a period of study and following public hearings at which the City Council heard testimony indicating that adult entertainment land uses would have an adverse affect on property values within the business and residential areas of the city. He also indicated that he had reviewed a summary of the findings and conclusions made when Seattle enacted a similar ordinance—those findings noted the deterioration of business and community neighborhoods where adult entertainment uses are permitted. Those findings prompted Seattle to enact an ordinance restricting adult entertainment uses to one specific area of the city. Plaintiffs contend that the city heard no expert testimony and that

they cannot rely on the Seattle experience. I disagree. There is no reason to require that Renton receive expert testimony to show what has been shown to be generally experienced elsewhere. See *Genusa v. City of Peoria*, 619 F. 2d 1203 (7th Cir. 1980).

(2) *Whether the Ordinance Suppresses or Greatly Restricts Access to Adult Fare.*

After reviewing the maps and affidavits, and hearing the testimony of Mr. Clemens, I conclude that although some of the approximately 400 acres which the city asserts is available for the location of adult entertainment uses is definitely not available, and although much of it is not ideal, the record at this stage of the proceeding would indicate that there are many adequate sites available. Plaintiffs' argument that such sites are not economically practicable is not relevant. The constraints of the ordinance may create economic hardship or loss for those who engage in the adult entertainment business, but that was also true in *Young*. See Justice Powell's concurring opinion at 78. The First Amendment inquiry is not concerned with economic impact but only the effect upon freedom of expression. All that is required is that those who wish to exhibit sexually explicit films be given ample area to do so, and that those who seek to view them be given access. The City of Renton appears to have provided ample area.

CONCLUSION

Applying the standards applicable in this Circuit to a motion for injunctive relief, I conclude that although there is some possibility of per se irreparable injury because plaintiffs are prevented from showing films arguably protected under the First Amendment, plaintiffs have not clearly established a probability that they will succeed on the merits. Rather, it appears that the case is

controlled by *Young* and that the ordinance only incidentally affects protected speech or expression.

As to the alternate test, I conclude that although the allegations in plaintiffs' complaint are sufficiently serious to be fair grounds for litigation, the balance of hardships does not tip decidedly in plaintiffs' favor. Although plaintiffs will not be able to show the sexually explicit films they desire to show unless and until this matter is concluded in their favor, they may continue to exhibit other films. The hardship upon them is no more severe than the general hardship imposed upon the one who desires to use a particular piece of property in a manner incompatible with its zoning. Weighed against this impact is the city's strong interest in assuring compliance with its zoning laws.

A proposed form of Order accompanies this Report and Recommendation.

DATED this 3d day of February, 1982.

/s/ Philip K. Sweigert
PHILIP K. SWEIGERT
United States Magistrate

APPENDIX J

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-3805

D.C. No. C-82-59M

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Plaintiffs/Appellants,

vs

THE CITY OF RENTON, *et al.*,
Defendants/Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that the City of Renton, the Appellee above named, hereby appeals to the Supreme Court of the United States from the judgment entered in this action on November 28, 1984.

This appeal is taken pursuant to 28 U.S.C. 1254 (2).

DATED this 4th day of February 1985.

/s/ Daniel Kellogg
DANIEL KELLOGG
Attorney for City of
Renton, et al.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3805

D.C. No. C-82-59M

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Plaintiffs/Appellants,

vs

THE CITY OF RENTON, *et al.*,
Defendants/Appellees.

CERTIFICATE OF SERVICE

I certify that a copy of the Notice of Appeal to the Supreme Court of the United States was served on the parties to this action on February 4, 1985, by mailing copies, postage prepaid, to them at the following addresses:

Jack R. Burns
10940 N.E. 33rd Pl., Suite 107
Bellevue, Washington 98004

Robert E. Smith
16133 Ventura Blvd., Suite 1230
Encino, California 91436

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Daniel Kellogg
DANIEL KELLOGG

57a

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. C82-59M

PLAYTIME THEATRES, INC.,
a Washington corporation,

and

KUKIO BAY PROPERTIES, INC.,
a Washington corporation,

vs. *Plaintiffs,*

THE CITY OF RENTON,

and

THE HONORABLE BARBARA Y. SHINPOCH,
as Mayor of the City of Renton,

and

EARL CLYMER, ROBERT HUGHES, NANCY MATHEWS, JOHN REED, RANDY ROCKHILL, RICHARD STREDICKE AND TOM TRIMM, as members of the City Council of the City of Renton; serve on: DELORES H. MEAD, City Clerk.

and

JIM BOURASA, as acting Chief of
Police of the City of Renton,

*Defendants, jointly and
severally, in their
representative capacities
only.*

AMENDED AND SUPPLEMENTAL COMPLAINT
FOR DECLARATORY JUDGMENT AND
PRELIMINARY AND PERMANENT INJUNCTION

COME NOW Playtime Theatres Inc. and Kukio Bay Properties Inc., bodies corporate of the State of Washing-

ton, by and through their attorneys, Jack R. Burns and Robert Eugene Smith, of counsel, and seek a declaratory judgment as well as a preliminary and permanent injunction with respect to City of Renton Ordinance No. 3526 entitled: "An Ordinance Of The City Of Renton, Washington, Relating To Land Use and Zoning;" enacted and approved by the Mayor and City Council on or about the 13th day of April, 1981 and in support of their cause of action, state:

I. JURISDICTION

1. This is a civil action whereby plaintiffs pray for a preliminary and permanent injunction enjoining the defendants from enforcement of the City of Renton Ordinance No. 3526, a copy of which is attached hereto as *Exhibit "A"* in support of this complaint, the contents of which are incorporated herein by reference, on the grounds that said ordinance and the multiple provisions thereof are unconstitutional as written, and/or as threatened to be applied to the plaintiffs in the case at bar. Further, plaintiffs pray for a declaratory judgment to determine the constitutionality of said Ordinance, as written and/or as threatened to be applied to the plaintiffs. The allegations to be set forth in the premises establish that there are presented questions of actual controversy between the parties involving substantial constitutional issues in that said ordinance, as written and/or in its threatened application, is repugnant to the rights of the plaintiffs herein under the *First, Fourth, Fifth, Sixth, and Fourteenth* Amendments to the Constitution of the United States.

2. Jurisdiction is conferred on this court for the resolution of the substantial constitutional questions presented by the provisions of 28 USCA § 1131(a) which provides in pertinent part:

(a) The district court shall have original jurisdiction of all civil actions wherein the matter in controversy

exceeds the sum or value of \$10,000.00, exclusive of interest and costs, and arises under the Constitution laws or treaties of the United States.

as well as 28 USCA § 1343(3) which provides in pertinent part that the district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

To redress the deprivation, under color of any any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . ."

and the organic law which further authorizes the institution of this suit founded on 42 USCA § 1983, which provides in pertinent part as follows:

Every person who, under color of any statute, ordinance, custom or usage, of any state or territory subjects, or causes to be subjected, any person of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, sued in equity, or other proper proceeding for redress.

Plaintiffs' prayer for declaratory relief is founded on *Rule 57* of the *Federal Rules of Civil Procedure*, as well as 28 USCA § 2201, which provides in pertinent part:

. . . Any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declarations, whether or not further relief is or could be sought . . .

The jurisdiction of this court to grant injunctive relief is conferred by 28 USCA § 2202, which provides:

Further necessary or proper relief based upon a declaratory judgment or decree may be granted after

reasonable notice and hearing against any adverse party whose rights have been determined by such judgment.

II. PARTIES

3. Playtime Theatres, Inc., a corporate body of the State of Washington plans to operate pursuant to a written lease agreement, a motion picture theatre which is located at 504 South 3rd Street, within the city limits of Renton, State of Washington. The enterprise will be operated under the name of the Roxy Theatre. Playtime Theatres, Inc. will also operate pursuant to a written lease agreement, the Renton Theatre at 507 South 3rd Street, within the city limits of Renton, State of Washington.

Kukio Bay Properties, Inc., a body corporate of the State of Washington has purchased the motion picture theatres described in the preceeding paragraph and has leased said theatres to Playtime Theatres, Inc.

That on January 26, 1982, Kukio Bay Properties, Inc. purchased of said theatres for the sum of \$800,000.00. That immediately thereafter, Kukio Bay Properties, Inc. took possession of said theatres. That on or about the 27th day of January, 1982, by a written agreement, Kukio Bay Properties, Inc. leased said theatre premises to Playtime Theatres, Inc. for a period of ten years commencing on January 27, 1982. In addition, Playtime Theatres, Inc. will have the option to renew said leases for an additional term of ten years terminating on January 26, 2002. The lease agreements to be entered into by the parties provide that the premises by [sic] used for the purpose of conducting therein adult motion picture theatres. Playtime Theatres, Inc. took possession of said theatres on or about January 27, 1982 and on January 29, 1982 planned to begin exhibiting feature length motion picture films for adult audiences.

From on or about January 29, 1982, under the operation and management of Playtime Theatres, Inc., one of said theatres would continuously operate exhibiting adult motion picture film fare to an adult public audience but for the threats of the defendants to enforce their wholly unconstitutional zoning ordinance.

4. The defendant, City of Renton, is a municipal corporation of the State of Washington.

5. The Honorable Barbara Y. Shinpoch is named defendant herein in her capacity as Mayor of the City of Renton, having the titular title. In that capacity, she is the head of City government and approved the questioned ordinance in the case at bar.

6. Earl Clymer, Robert Hughes, Nancy Mathews, John Reed, Randy Rockhill, Richard Stredicke and Tom Trimm are named as defendants herein as members of the City Council of the City of Renton who enacted the wholly unconstitutional ordinance as a part of their alleged legislative function.

8. Jim Bourasa is named a defendant herein in his capacity as Acting Chief of Police of the City of Renton who is primarily responsible for seeing to the enforcement of the City of Renton ordinances, civil, criminal and quasi-criminal in nature.

9. The defendants in their official capacities as aforesaid have acted and/or threaten to act to plaintiffs' immediate and irreparable harm under color of authority of the Ordinance No. 3526 heretofore identified as *Exhibit "A"*.

The named defendants, in their official capacity as afore-mentioned, are joined herein to make enforceable to them and/or their agents, servants, employees and attorneys, any Preliminary and/or Permanent Injunction, Declaratory Judgment, and/or other Order of this Court.

III. FACTUAL ALLEGATIONS

10. The instant ordinance was passed with the sole purpose to prevent the opening of any adult motion picture theatre within the city limits of Renton and to effectively censor the kinds of protected *First Amendment* press materials available to adult citizens of the City of Renton and adult visitors to the City.

11. That no criminal, quasi-criminal and/or civil proceeding is pending in the city courts of the City of Renton or in the state courts in the State of Washington against the plaintiffs and/or their agents, servants and employees as of the date of the filing of this suit with respect to this matter.

12. That on the 19th day of January, 1982, Mike Parness, Administrative Assistant to the Mayor of the City of Renton has, as aforesaid, advised that if the property of the plaintiffs is used to exhibit adult motion picture films, then enforcement proceedings will be commenced forthwith.

13. That the City of Renton Ordinance No. 3526 was enacted by the City Council and approved by the Mayor as a part of a systematic scheme, plan and design, under color of enforcement of the said ordinance to deny distributors and/or exhibitors of adult films access to the marketplace, and to deny to the interested adult public, access to such erotic materials which are not otherwise obscene under the test set forth in *Miller v. California*, 413 U.S. 15 (1973). See *Young v. American Mini Theatres*, 427 U.S. 50 (1975) at pages 62 and 71.

14. That requiring the plaintiffs to conform to this wholly unconstitutional zoning ordinance by not using the locations they have contracted to purchase, and requiring them to move their business to a selectively obscure geographical location, violates the plaintiffs' rights under the *First, Fifth, Sixth and Fourteenth Amendments* to

the Constitution of the United States. Indeed, by this selective ordinance, which would shutter motion picture theatres such as the Roxy Theatre and Renton Theatre, which show as part of their fare, erotic films, the City of Renton by its agents, servants and employees will be denying the plaintiffs and other persons lawfully engaged in the exhibition of adult film fare presumptively protected by the *First Amendment* to the Constitution of the United States, [*Heller v. People of the State of New York*, 413 U.S. 483 (1973); and *Roaden v. Commonwealth of Kentucky*, 413 U.S. 496 (1973)], access to the marketplace as well as the right of the interested adult public to have access to adult film fare, and will deny the plaintiffs the right to engage in said business in the City of Renton; and unless restrained, the City, under color of enforcement of its zoning laws, will cause said businesses to cease and close up; and unless restrained, defendants will continue to seek to enforce said ordinance and this will have the effect of totally depriving your plaintiffs, as well as others similarly situate, from their normal business activities. This will have a chilling effect on the dissemination and exhibition of adult film fare to those interested adults who seek to satiate their educational, entertainment, literary, scientific and artistic interests in such press materials. The ordinance places an intolerable burden upon the exercise of *First Amendment* rights, arbitrarily and capriciously discriminates [*sic*] as to the nature of film fare exhibited based upon an assumption which is not rationally related to a valid public purpose nor necessary to achieve a compelling state interest in violation of the Equal Protection Clause of the *Fourteenth Amendment* of the Constitution of the United States, establishes classifications which are arbitrary and capricious and constitutes an abuse of legislative discretion and is not rationally related and also deprives plaintiffs of their equal rights under the *Fourteenth Amendment* of the Constitution of the United States; and further by its use has language that is intrinsically vague

and void under the *First* and *Fifth Amendments* to the Constitution of the United States and void for impermissible overbreadth by the use of means which are too broad for the alleged evil intended to be curtailed. That the enactment of the City of Renton Ordinance No. 3526 was done without the constitutionally required legislative fact finding required to meet the burden imposed upon those who seek to curtail activity which might otherwise be protected within the pneumbra [*sic*] of the *First Amendment* of the Constitution of the United States. The defendants, by their agents, servants and employees, and/or their attorneys, by enacting such a wholly unconstitutional ordinance, and now threatening to enforce the same, have created a pervasive atmosphere of official repression constituting a "chilling effect" upon the exercise of *First Amendment* rights of plaintiffs and others who may wish to engage in the lawful business of exhibiting adult film fare protected by the *First Amendment* to the Constitution of the United States, as well as the interested adult public who desire to see and view such adult film fare, and this has imposed and threatens to impose a wholly unconstitutional prior restraint condemned by the *First*, *Fourth*, *Fifth*, and *Fourteenth Amendments* to the Constitution of the United States, and this is merely a design and scheme on the part of the defendants to force the plaintiffs and others similarly situate out of business, under color and pretense of claimed enforcement of the ordinance attached hereto as *Exhibit "A"*, well knowing the patent unconstitutionality of the same.

15. Ordinance No. 3526 provides a new use classification within the zoning laws of the City of Renton; i.e., an adult motion picture theatre.

16. An adult motion picture theatre is not a permitted use within any zoning classification currently in use within the City of Renton. Accordingly, in order to locate an adult motion picture theatre anywhere within the City of

Renton, it is necessary to obtain a special permit, conditional use or variance.

17. The process of applying for a special permit, conditional use or variance vests unfettered discretionary authority in the Hearing Examiner, Board of Adjustment and/or City Council to deny such special permit, conditional use or variance. No objective written criteria, standards or guidelines have been established which would in any way limit this discretionary authority. In addition, the ordinances of the City of Renton set no time limit for the City Council to make a decision relative to an application for a special permit, conditional use or variance. The City Council has the discretion to withhold making a decision for an unreasonable length of time if it chooses to do so. The various matters to be considered by the Hearing Examiner and/or the Board of Adjustment in the granting or denial of a special permit, conditional use or variance are vague and aesthetic qualities that are not capable of objective measurement and, as such, they create the potential for an unreasonable burden upon free speech and, as applied to plaintiffs and a motion picture theatre, they are impermissibly overbroad and unconstitutional.

18. That requiring the plaintiffs to submit to a wholly unconstitutional exercise of unbridled discretion at the hands of a Hearing Examiner or Board of Adjustment and/or the City Council, in the absence of narrowly drawn, reasonable and definitive [*sic*] standards to be followed in the exercise of said discretion violates plaintiffs' rights under the *First*, *Fifth* and *Fourteenth Amendments* to the Constitution of the United States. *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968) and *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

19. Further, since the Hearing Examiner, Board of Adjustment and/or the City Council have no narrowly drawn, reasonable and definitive standards to be fol-

lowed by them in the exercise of the discretion conferred upon them by the Renton Zoning Code in making a determination about the issuance of a special permit, conditional use or variance, it would be an exercise in futility to engage in such administrative process because of the patently unconstitutional character of the zoning provisions in question.

20. The provisions of the Renton Zoning Code which apply to the issuance of special permits, conditional uses or variances, establish classifications which are arbitrary and capricious and constitute an abuse of legislative discretion, and also permit censorship by standardless rationale subject to abusive discretion by the defendants in violation of plaintiffs' substantive and due process rights under the pneumbra [*sic*] of the *First, Fifth and Fourteenth Amendments* of the Constitution of the United States; and further, have language that is intrinsically vague and void under the *First and Fifth Amendments* to the United States Constitution and void for impermissible overbreadth.

IV. BASIS IN LAW FOR RELIEF

21. Plaintiffs have the right to engage in the business of offering for exhibition adult motion picture film fare for profit by virtue of the *First Amendment* to the Constitution or adult film fare which is presumptively protected under said constitutional amendment, and the public, including both adult citizens and visitors to the City of Renton have the same constitutional right to view said adult motion picture film fare as may be offered for said exhibition to said adults in a nonintrusive manner. *Heller v. New York*, 413 U.S. 483, 37 L.Ed.2d 745, 93 Sup.Ct. 2789 (1973). Further, the conduct of the defendants and their agents, servants, employees and/or attorneys and others, acting under their direction and control in attempting to refuse to allow plaintiffs to op-

erate their businesses in the City of Renton, unless they remove themselves to some obtuse selectively obscure geographical site, will have the draconian effect of denying plaintiffs and others similarly situate, access to the marketplace, and the viewing adult public the right to satisfy its interest for adult film fare.

22. As a further result of the unconstitutional ordinance enacted by the City Council and approved by the Mayor, as well as the threatened conduct of the defendants to force plaintiffs to not engage in their businesses, plaintiffs have been required to retain attorneys to pursue their rights under the *First, Fourth, Fifth, and Fourteenth Amendments* to the Constitution of the United States, and the defendants, acting under color of pretense of law, as aforesaid, have threatened to initiate actions to enforce the said ordinance, which actions are and/or threaten to be, repugnant to the Constitution of the United States.

23. The City of Renton zoning ordinance designated herein as Ordinance No. 3526, is clearly repugnant to the *First, Fourth, Fifth and Fourteenth Amendments* to the Constitution of the United States as written and as threatened to be applied, for the following reasons:

(a) Said ordinance is void for vagueness in that it fails to establish by its terms, definitive standards, criteria and/or other controlling guides defining words, *inter alia* "other religious facility or institution" in Section II(A)(4) or "distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" as used in Section I(1) of said ordinance, as well as the words "erotic touching" as used in Section I(2)(C); and as such is a deprivation under color of state law of plaintiffs' right to due process under the *First, Fifth and Fourteenth Amendments* to the Constitution of the United States.

(b) Said ordinance is void for impermissible overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the same sets forth standards at variance with those minimum standards prescribed by the Supreme Court of the United States, in connection with the exercise of *First Amendment* rights, and in particular, those provisions which set forth the "specified anatomical areas" and "specified sexual activities" in Section I(2) and Section I(3).

(c) Said ordinance is further void for impermissible overbreadth and deprives plaintiffs of due process and equal protection of the law through the arbitrary and uncontrolled power conferred by the enactment of said ordinance to the defendants' enforcement of zoning laws for the exercise of otherwise clear *First Amendment* rights and therefore the same is invalid under the *First and Fifth Amendments* to the Constitution of the United States made obligatory on the States under the due process provisions of the *Fourteenth Amendment*.

(d) Said ordinance, lacking precision and narrow specificity in the standards to be employed by defendants in the operation of their legislative power to enact zoning laws, constitutes a prior restraint under color of state law on the exercise of plaintiffs of their rights under the *First, Fifth and Fourteenth Amendments* to the Constitution of the United States and as written, which is and has been, under the facts alleged herein, susceptible to arbitrary, capricious and uncontrolled discretion on the part of defendants herein, their agents, servants and employees.

(e) Said ordinance is void in that it fails, by its terms, to establish procedural safeguards to assure a prompt decision on the challenge to the arbitrary zoning classification, and if a zoning challenge is de-

nied, the ordinance fails by its terms to provide for a prompt final judicial review to minimize the deterrent effect of an interim and possibly erroneous zoning classification under procedures which places the burden on plaintiffs to both expeditiously institute judicial review and to persuade the courts that the activity sought to be licensed and the procedure and ordinance employed to authorize the same, is without the ambit of the *First Amendment*, and the abatement of the nonconforming use is not a proper exercise of authority.

(f) Said ordinance is further void in that the same, by its terms, places an impermissible burden upon the exercise of plaintiffs' *First Amendment* rights.

(g) Said ordinance is further void as violative of the Equal Protection Clause of the *Fourteenth Amendment*, in that the same creates a statutory classification which has no rational relationship to a valid public purpose nor is the same necessary to the achievement of a compelling state interest by the least drastic means.

(h) Said ordinance is repugnant to the substantive due process provisions of the *Fifth and Fourteenth Amendments* to the Constitution of the United States because the same permits deprivation of liberty and/or property interests for the exercise of *First Amendment* rights by unreasonable, arbitrary and capricious means without a showing of a real and substantial relationship to any state or city subordinating interest which is compelling to justify state or city action limiting the exercise by plaintiffs of their *First Amendment* freedoms.

(i) Said ordinance is impermissibly overbroad and repugnant to the procedural due process requirements of the *Fifth and Fourteenth Amendments* to the Constitution of the United States, in that the

same employs means lacking adequate safeguards, which due process demands, to assure presumptively protected press materials, sought to be distributed to an interested adult public, the constitutional protection of the *First Amendment*.

(j) Said ordinance is vague and impermissibly overbroad and thus repugnant to the *First, Fourth, Fifth and Fourteenth Amendments* to the United States Constitution, in that said ordinance, by its provisions, permits inherent powers of censorship and suppression constituting a prior restraint on the exercise of plaintiffs' *First Amendment* rights as well as the interested adult public who may desire to view presumptively protected press materials for the ideas presented therein.

(k) Said ordinance, and particularly Section I(2), in defining "specified sexual activities" defines that phrase in part as "erotic touching" and is thus void for vagueness in that "erotic" is a word that can mean many things to many people and without further clarification confers on defendants unbridled discretion in the interpretation of that term and as such, is violative of the plaintiffs' rights under the *First, Fifth and Fourteenth Amendments* to the Constitution of the United States.

(l) Said ordinance and particularly Section II(A) as it purports to establish restrictions, requirements and conditions for an alleged adult theatre imposes burdens, restrictions and conditions that are not justified by any compelling state interest and as such, the classification is an invidious and arbitrary discrimination as to a class and as such, is a denial of plaintiffs' rights under the *Fourteenth Amendment* to the Constitution of the United States, particularly where, as here, protected *First Amendment* activity is involved.

(m) The plaintiffs will suffer immediate and substantial economic harm if said ordinance is applied to them and the result of the application of said ordinance to the activities of the plaintiffs will result in a forfeiture of substantial business interests and assets.

24. Plaintiffs herein aver that their rights afforded under the *First, Fourth, Fifth, Sixth and Fourteenth Amendments* to the Constitution of the United States have been violated by said defendants in the enactment of a wholly unconstitutional ordinance, and that unless this Court grants the relief prayed for, said plaintiffs and others similarly situate, as well as the interested adult public, will suffer irreparable harms.

25. Plaintiffs aver that the aforesaid action of the defendants in enacting said ordinance, and the threatened enforcement thereof by said defendants acting under color of state law, is in furtherance of a scheme, plan and design to prevent any business activity which may offer for sale or exhibition adult press materials in the City of Renton to the adult public.

26. Those portions of the Renton Municipal Code contained in Chapter 4-722 relative to the issuance of special permits, conditional uses and variances, are clearly repugnant to the *First, Fourth, Fifth and Fourteenth Amendments* to the Constitution of the United States as written and as threatened to be applied, for the following reasons:

(a) Said provisions are void for vagueness in that they fail to establish by their terms definitive standards, criteria or other controlling guides defining concepts such as, *inter alia*

* * * *

Special Permits: Recognizing that there are certain uses of property that may be detrimental to the public health, safety, morals and general welfare . . .

* * *

The purpose of a conditional use permit shall be to assure, by means of imposing special condition and requirements on development, that the compatibility of uses, a purpose of this Title, shall be maintained, considering other existing and potential uses within the general area of the proposed use.

* * *

The examiner may deny any application if the characteristics of the intended use would create an incompatible or hazardous condition.

* * *

The examiner shall have the right to limit the term and duration of any such conditional use permit and may impose such conditions as are reasonably necessary and required.

* * *

The conditions imposed shall be those which will reasonably assure that nuisance or hazard to life or property will not develop.

* * *

The examiner may, after a public hearing, permit the following uses in districts from which they are prohibited by this Chapter where such uses are deemed essential or desirable to the public convenience or welfare and are in harmony with the various elements or objectives of the comprehensive plan.

* * *

The hearing examiner shall be empowered to approve conditionally approve or disapprove said conditional use permit applications based on normal planning considerations, including, but not limited to the

following factors: (a) suitability of site; (b) conformance to the comprehensive plan; (c) harmony with the various elements or objectives of the comprehensive plan; (d) the most appropriate use of land through the city; (e) stabilization and conservation of the value of property; . . . and prevention of neighborhood deterioration and blight; (o) the objectives of zoning and planning in the community; (p) the effect upon the general city's welfare of this proposed use in relation to surrounding uses in the community.

* * *

That the granting of the variance will not be materially detrimental to the public welfare or injurious to the property improvements in the vicinity and zone in which subject property is situated.

* * *

That approval shall not constitute a grant of special privilege inconsistent with the limitation upon uses of other properties in the vicinity and zone in which the subject property is situated.

* * *

That the approval is determined by the examiner or Board of Adjustment is a minimum variance that will accomplish the desired purpose.

and as such are a deprivation under color of law of plaintiffs' right to due process under the *First, Fifth* and *Fourteenth Amendments* to the Constitution of the United States. Said provisions are void for impermissible overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the same set forth standards at variance with those minimum standards prescribed by the Supreme Court of the United States in connection with the exercise of First Amendment rights.

(b) Said provisions are further void for impermissible overbreadth and deprive plaintiffs of due process and equal protection of the law through the arbitrary and uncontrolled discretionary power conferred by said provisions upon the Hearing Examiner, Board of Adjustment and City Council and, therefore, the same are invalid under the *First* and *Fifth Amendments* to the Constitution of the United States made obligatory on the States under the due process provisions of the *Fourteenth Amendment*.

(c) Said provisions lack precision and narrow specificity in the standards to be employed by the Hearing Examiner, Board of Adjustment and/or City Council in the exercise of the discretion used in the operation of the City of Renton's legislative power to enact ordinances providing for zoning and, as such, constitute a prior restraint under color of state law and the exercise by plaintiffs of their rights under the *First, Fifth* and *Fourteenth Amendments* to the Constitution of the United States and as written, which is and have been, under the facts alleged herein, susceptible to arbitrary, capricious and uncontrolled discretion on the part of the defendants herein, their agents, servants and employees.

(d) Said provisions are void in that they fail by their terms to establish procedural safeguards to assure a prompt decision on a challenge to the capricious denial of a special permit, conditional use or variance. The provisions fail by their terms to provide for a prompt final judicial review to minimize the deterrent effect on an interim and possibly erroneous and arbitrary denial of a zoning special permit, conditional use or variance and, thus, the burden is on plaintiffs to both expeditiously institute judicial review and to persuade the courts that the activity sought to be pursued and the procedures and ordinances employed to prohibit the same are without the ambit of the *First Amendment*.

V. RELIEF SOUGHT

27. Plaintiffs are entitled to and desire that this Court enter a declaratory judgment, declaring Ordinance No. 3526 to be unconstitutional as written and/or as defendants purport to apply it, in whole or in part, to be repugnant to the *First, Fourth, Fifth, Sixth* and/or *Fourteenth Amendments* to the Constitution of the United States.

28. Plaintiffs seek a preliminary and permanent injunction to prohibit the enforcement by defendants, and/or their agents, servants, employees, attorneys, and others acting under its direction and control of the provisions of Ordinance No. 3526.

WHEREFORE, plaintiffs pray:

1. That defendants be required to answer forthwith this Amended and Supplemental Complaint in conformance with the rules and practices of this Honorable Court.

2. That a Declaratory Judgment be rendered declaring Ordinance No. 3526 to be unconstitutional as written, in whole and/or in part, and that this Court further declare the ordinance to be unconstitutional in its threatened application to the plaintiffs.

3. That a Preliminary Injunction issue from this Court upon hearing, restraining defendants and their agents, servants, employees, and attorneys, and others acting under their direction and control, pending a hearing and determination on plaintiffs' application for a Permanent Injunction, from enforcing or executing and/or threatening to enforce and/or execute the provisions of Ordinance No. 3526 in whole and/or in part, by arresting plaintiffs, their agents, servants or employees, and/or threatening to arrest plaintiffs, their agents, servants and employees and/or harassing, threatening to close, or otherwise interfering with plaintiffs' peaceful use of the premises.

4. That upon a final hearing, that this Court issue its Permanent Injunction prohibiting the defendants and/or

their agents, servants and employees, and/or others in concert with them, from enforcing Ordinance No. 3526 in whole or in part because of its patent unconstitutionality.

5. That upon a final hearing this Court award to the plaintiffs such damages as they shall have sustained by reason of loss of business, the expenditure of assets to enforce and protect the rights guaranteed to them under the Constitution of the United States, their reasonable attorney's fees and such other damages as may be established at the time of trial.

6. And for such other and further relief as may be appropriate under the circumstances of this case.

DATED this — day of February, 1982.

Respectively submitted,

HUBBARD, BURNS & MEYER

By /s/ Jack R. Burns
JACK R. BURNS
Attorney for Plaintiffs

Of Counsel:

Robert Eugene Smith, Esq.
16133 Ventura Blvd.
Penthouse Suite F.
Encino, California 91436
(213) 981-9421

STATE OF WASHINGTON)
) SS.
COUNTY OF KING)

COMES NOW Jack R. Burns who, after being duly sworn, did depose and say:

1. That Playtime Theatres, Inc. and Kukio Bay Properties, Inc. are bodies corporate of the State of Washington, in good standing.

2. That affiant is one of the attorneys for said corporations. Affiant further states that he is authorized to speak on their behalf.

3. That said corporations are the plaintiffs in the within proceedings.

4. That he has read the complaint to which this affidavit is affixed and asserts that the factual allegations contained therein are true and correct to the best of his information, knowledge and belief.

5. That the enforcement of the City of Renton Ordinance No. 3526 will, if upheld, have the effect of depriving plaintiffs of access to the marketplace to exhibit their presumptively protected *First Amendment* wares of adult film fare; and further, will deny to interested adults, the access to such material for their information, education, entertainment, literary, scientific or artistic interests, as well as subject plaintiffs, their agents, servants and employees to criminal arrests and confiscatory fines and forfeitures of property interests; and would further destroy the property and interest of said corporations in the location of their theatres operated at 504 South 3rd Street, and 507 South 3rd Street, in the City of Renton, and subject said plaintiff corporations to grievous financial harm as well as to also chill their rights of free speech as guaranteed by the *First Amendment*. *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

/s/ Jack R. Burns
JACK R. BURNS

SUBSCRIBED AND SWORN to before me this 8th day of February, 1982.

/s/ (Illegible)
Notary Public in and for the
State of Washington residing
at (illegible)

APPENDIX L

CITY OF RENTON, WASHINGTON
ORDINANCE NO. 3526AN ORDINANCE OF THE CITY OF RENTON,
WASHINGTON, RELATING TO LAND
USE AND ZONING

THE CITY COUNCIL OF THE CITY OF RENTON,
WASHINGTON, DO ORDAIN AS FOLLOWS:

SECTION I: Existing Section 4-702 of Title IV (Building Regulations) of Ordinance No. 1628 entitled "Code of General Ordinances of the City of Renton" is hereby amended by adding the following subsections:

1. "*Adult Motion Picture Theater*": An enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characteristic by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as hereafter defined, for observation by patrons therein.

2. "*Specified Sexual Activities*":

- (a) Human genitals in a state of sexual stimulation or arousal;
- (b) Acts of human masturbation, sexual intercourse or sodomy;
- (c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

3. "*Specified Anatomical Areas*"

- (a) Less than completely and opaquely covered human genitals, pubic region, buttock, and fe-

male breast below a point immediately above the top of the areola; and

- (b) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

SECTION II: There is hereby added a new Chapter to Title IV (Building Regulations) of Ordinance No. 1628 entitled "Code of General Ordinances of the City of Renton" relating to adult motion picture theaters as follows:

A. Adult motion picture theaters are prohibited within the area circumscribed by a circle which has a radius consisting of the following distances from the following specified uses or zones:

- 1. Within or within one thousand (1000') feet of any residential zone (SR-1, SR-2, R-1, S-1, R-2, R-3, R-4 or T) or any single family or multiple family residential use.
- 2. One (1) mile of any public or private school
- 3. One thousand (1000') feet of any church or other religious facility or institution.
- 4. One thousand (1000') feet of any public park or P-1 zone.

B. The distances provided in this section shall be measured by following a straight line, without regard to intervening buildings, from the nearest point of the property parcel upon which the proposed use is to be located, to the nearest point of the parcel of property or the land use district boundary line from which the proposed land use is to be separated.

SECTION III: This Ordinance shall be effective upon its passage, approval and thirty days after its publication.

PASSED BY THE CITY COUNCIL this 13th day of April, 1981.

/s/ Delores A. Mead
DELORES A. MEAD
City Clerk

APPROVED BY THE MAYOR this 13th day of April, 1981.

/s/ Barbara Y. Shinpoch
BARBARA Y. SHINPOCH
Mayor

Approved as to form:

/s/ Lawrence J. Warren
LAWRENCE J. WARREN,
City Attorney
Date of Publication: May 15, 1981

APPENDIX M

CITY OF RENTON, WASHINGTON ORDINANCE NO. 3629

AN ORDINANCE OF THE CITY OF RENTON, WASHINGTON RELATING TO LAND USE AND ZONING

WHEREAS, on April 13, 1981, the City Council of the City of Renton adopted Ordinance No. 3526, which Ordinance was approved by the Mayor on April 13, 1981, and became effective by its own terms on June 14, 1981; and

WHEREAS, it was the intention of the City Council of the City of Renton in the adoption of that Ordinance to rely upon the opinion of the United States Supreme Court in the case of *Young v. American Mini Theatres*, 427 US 50, and of the Supreme Court of the State of Washington in the case of *Northend Cinemas v. Seattle*, 90 Wn 2d, 709, to limit the location of adult motion picture theaters, as that term is defined therein, to promote the City of Renton's great interest in protecting and preserving the quality of its neighborhoods, commercial districts, and the quality of urban life through effective land use planning; and

WHEREAS, the City Council, through its Planning and Development Committee, held a public meeting on March 5, 1981, to receive testimony from the public concerning the subject of regulation of adult entertainment land uses, at which the following testimony was received which the City Council believes to be true, and which formed the basis for the adoption of Ordinance No. 3526:

1. Areas within close walking distance of single and multiple family dwellings should be free of adult entertainment land uses.
2. Areas where children could be expected to walk, patronize or recreate should be free of adult entertainment land uses.

3. Adult entertainment land uses should be located in areas of the City which are not in close proximity to residential uses, churches, parks and other public facilities, and schools.
4. The image of the City of Renton as a pleasant and attractive place to reside will be adversely affected by the presence of adult entertainment land uses in close proximity to residential land uses, churches, parks and other public facilities, and schools.
5. Regulation of adult entertainment land uses should be developed to prevent deterioration and/or degradation of the vitality of the community before the problem exists, rather than in response to an existing problem.
6. Commercial areas of the City patronized by young people and children should be free of adult entertainment land uses.
7. The Renton School District opposes a location of adult entertainment land uses within the perimeters of its policy regarding bussing of students, so that students walking to school will not be subjected to confrontation with the existence of adult entertainment land uses.
8. The Renton School District finds that location of adult entertainment land uses in areas of the City which are in close proximity to schools, and commercial areas patronized by students and young people, will have a detrimental effect upon the quality of education which the School District is providing for its students.
9. The Renton School District finds that education of its students will be negatively affected by location of adult entertainment land uses in close proximity to location of schools.

10. Adult entertainment land uses should be regulated by zoning to separate it from other dissimilar uses just as any other land use should be separated from uses with characteristics different from itself.
11. Residents of the City of Renton, and persons who are non-residents but use the City of Renton for shopping and other commercial needs, will move from the community or shop elsewhere if adult entertainment land uses are allowed to locate in close proximity to residential uses, churches, parks and other public facilities, and schools.
12. Location of adult entertainment land uses in proximity to residential uses, churches, parks and other public facilities, and schools, may lead to increased levels of criminal activities, including prostitution, rape, incest and assaults in the vicinity of such adult entertainment land uses.
13. Merchants in the commercial area of the City are concerned about adverse impacts upon the character and quality of the City in the event that adult entertainment land uses are located within close proximity to residential uses, churches, parks and other public facilities, and schools. Location of adult entertainment land uses in close proximity to residential uses, churches, parks and other public facilities, and schools, will reduce retail trade to commercial uses in the vicinity, thus reducing property values and tax revenues to the City. Such adverse affect on property values will cause the loss of some commercial establishments followed by a blighting effect upon the commercial districts within the City, leading to further deterioration of the commercial quality of the City.
14. Experience in numerous other cities, including Seattle, Tacoma and Detroit, Michigan, has shown

that location of adult entertainment land uses degrade the quality of the areas of the City in which they are located and cause a blighting effect upon the city. The skid row effect, which is evident in certain parts of Seattle and other cities, will have a significantly larger affect upon the City of Renton than other major cities due to the relative sizes of the cities.

15. No evidence has been presented to show that location of adult entertainment land uses within the City will improve the commercial viability of the community.
16. Location of adult entertainment land uses within walking distance of churches and other religious facilities will have an adverse effect upon the ministry of such churches and will discourage attendance at such churches by the proximity of adult entertainment land uses.
17. A reasonable regulation of the location of adult entertainment land uses will provide for the protection of the image of the community and its property values, and protect the residents of the community from the adverse effects of such adult entertainment land uses, while providing to those who desire to patronize adult entertainment land uses such an opportunity in areas within the City which are appropriate for location of adult entertainment land uses.
19. The community will be an undesirable place to live if it is known on the basis of its image as the location of adult entertainment land uses.
20. A stable atmosphere for the rearing of families cannot be achieved in close proximity to adult entertainment land uses.

21. The initial location of adult entertainment land uses will lead to the location of additional and similar uses within the same vicinity, thus multiplying the adverse impact of the initial location of adult entertainment land uses upon the residential [*sic*], churches, parks and other public facilities, and schools, and the impact upon the image and quality of the character of the community.

and

WHEREAS, since the adoption of Ordinance No. 3526, it has come to the attention of the City Council of the City of Renton that it would be appropriate to set forth in writing the findings of fact which were the basis for the adoption by the City Council of Ordinance No. 3526; and

WHEREAS, the City Council finds that, in order to choose the least restrictive alternative available to accomplish the purposes for which Ordinance No. 3526 was adopted, and to include a severability clause which was inadvertently omitted from Ordinance No. 3526, and to make certain other technical amendments to Ordinance No. 3526, that it is necessary for the City Council to adopt legislation amending Ordinance No. 3526 to accomplish the foregoing purposes; and

WHEREAS, the City Council, at its duly called special meeting on February 25, 1982, held a public hearing upon the subject matter of land use regulations of adult motion pictures within the City of Renton, at which public hearing the City Council received comments from the public on that subject matter at which the following testimony was received, which the City Council believes to be true, and which, together with the findings heretofore set forth as the basis for the adoption of Ordinance No. 3526, form the basis for the adoption of this Ordinance:

1. Many parents have chosen the City of Renton in which to raise their families because of the lack

of pornographic entertainment outlets with its influence upon children external to the home.

2. Location of adult entertainment land uses on the main commercial thoroughfares of the City gives an impression of legitimacy to, and causes a loss of sensitivity to the adverse affect of pornography upon children, established family relations, respect for marital relationships and for the sanctity of marriage relations of others, and the concept of non-aggressive consensual sexual relations.
3. Citizens from other cities and King County will travel to Renton to view adult film fare away from areas in which they are known and recognized.
4. Property values in the areas adjacent to the adult entertainment land uses will decline, thus causing a blight upon the commercial area of the City of Renton.
5. Location of adult entertainment land uses within neighborhoods and commercial areas of the City of Renton is disrupting to youth programs such as Boy Scouts, Cub Scouts and Campfire Girls. Many such youth programs use the commercial areas of the City as a historical research resource. Location of adult entertainment land uses in close proximity to residential uses, churches, parks and other public facilities and schools is inappropriate.
6. Location of adult entertainment land uses in close proximity to residential uses, churches, parks and other public facilities, and schools, will cause a degradation of the community standard of morality. Pornographic material has a degrading effect upon the relationship between spouses.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF RENTON, WASHINGTON DO ORDAIN AS FOLLOWS:

SECTION I: Existing Section 4-702 of Title IV (Building Regulations) of Ordinance No. 1628 entitled "Code of General Ordinances of the City of Renton" is hereby amended by adding the following subsections:

"Used" The word "used" in the definition of "Adult motion picture theater" herein, describes a continuing course of conduct of exhibiting "specific sexual activities" and "specified anatomical areas" in a manner which appeals to a prurient interest.

SECTION II: Existing Section 4-735 of Title IV (Building Regulations) of Ordinance No. 1628 entitled "Code of General Ordinances of the City of Renton" is hereby amended by adding the following subsections:

(C) Violation of the use provisions of this section is declared to be a public nuisance *per se*, which shall be abated by City Attorney by way of civil abatement procedures only, and not by criminal prosecution.

(D) Nothing in this section is intended to authorize, legalize or permit the establishment, operation or maintenance of any business, building or use which violates any City of Renton ordinance or statute of the State of Washington regarding public nuisances, sexual conduct, lewdness, or obscene or harmful matter or the exhibition or public display thereof.

SECTION III: Existing subsection (A) (2) of Section 4-735 of Title IV (Building Regulations) of Ordinance No. 1628 entitled "Code of General Ordinances of the City of Renton" is hereby amended to read as follows:

2. One thousand feet (1,000') of any public or private school.

SECTION IV: City of Renton Ordinance No. 3526 is hereby amended by adding the following section to read as follows:

If any section, subsection, sentence, clause, phrase or any portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council of the City of Renton hereby declares that it would have adopted City of Renton Ordinance No. 3526 and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections, sentence, clauses, phrases or portions be declared invalid or unconstitutional.

SECTION V: If any section, subsection, sentence, clause, phrase or any portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council of the City of Renton hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases or portions be declared invalid or unconstitutional.

SECTION VI: The City Council of the City of Renton finds and declares that an emergency exists because of the pendency of litigation against the City of Renton involving the subject matter of this ordinance, and potential liability of the City of Renton for damages as pleaded in that litigation, and that the immediate adoption of this ordinance is necessary for the immediate preservation of public peak [*sic*], health, and safety or for the support of city government and its existing public institutions and the integrity of the zoning of the City of Renton.

Therefore, this ordinance shall take effect immediately upon its passage and approval by the mayor.

PASSED BY THE CITY COUNCIL this 3th day of May, 1982.

/s/ Delores A. Mead
DELORES A. MEAD
City Clerk

APPROVED BY THE MAYOR this 3th day of May, 1982.

/s/ Barbara Y. Shinpoch
BARBARA Y. SHINPOCH
Mayor

Approved as to form:

/s/ Lawrence J. Warren
LAWRENCE J. WARREN
City Attorney

Date of Publication: May 7, 1982

APPENDIX N

CITY OF RENTON, WASHINGTON
ORDINANCE NO. 3637

AN ORDINANCE OF THE CITY OF RENTON, WASHINGTON AMENDING ORDINANCE NO. 3526 RELATING TO LAND USE AND ZONING AND AMENDING ORDINANCE NO. 3629 BY DELETING THE EMERGENCY CLAUSE AND RE-ENACTING THE REMAINDER THEREOF

WHEREAS, on April 13, 1981, the City Council of the City of Renton adopted Ordinance No. 3526, which Ordinance was approved by the Mayor on April 13, 1981, and became effective by its own terms on June 14, 1981; and

WHEREAS, on May 3, 1982, the City Council of the City of Renton adopted Ordinance No. 3629 amending Ordinance No. 3526, which Ordinance was approved by the Mayor on May 3, 1982, and became effective on its passage and by the terms of the Ordinance; and

WHEREAS the City Council wishes to remove the emergency clause from Ordinance No. 3629 and re-enact the remainder of Ordinance No. 3629 in its entirety; and

WHEREAS, it was the intention of the City Council of the City of Renton in the adoption of Ordinance No. 3526 to rely upon the opinion of the United States Supreme Court in the case of *Young v. American Mini Theatres*, 427 US 50, and of the Supreme Court of the State of Washington in the case of *Northend Cinemas v. Seattle*, 90 Wn 2d, 709, to limit the location of adult motion picture theaters as that term is defined therein, to promote the City of Renton's great interest in protecting and preserving the quality of its neighborhoods, commercial districts, and the quality of urban life through effective land use planning; and

WHEREAS, the City Council, through its Planning and Development Committee, held a public meeting on March

5, 1981, to receive testimony from the public concerning the subject of regulation of adult entertainment land uses, at which the following testimony was received which the City Council believes to be true, and which formed the basis for the adoption of Ordinance No. 3526:

1. Areas within close walking distance of single and multiple family dwellings should be free of adult entertainment land uses.
2. Areas where children could be expected to walk, patronize or recreate should be free of adult entertainment land uses.
3. Adult entertainment land uses should be located in areas of the City which are not in close proximity to residential uses, churches, parks and other public facilities, and schools.
4. The image of the City of Renton as a pleasant and attractive place to reside will be adversely affected by the presence of adult entertainment land uses in close proximity to residential land uses, churches, parks and other public facilities, and schools.
5. Regulation of adult entertainment land uses should be developed to prevent deterioration and/or degradation of the vitality of the community before the problem exists, rather than in response to an existing problem.
6. Commercial areas of the City patronized by young people and children should be free of adult entertainment land uses.
7. The Renton School District opposes a location of adult entertainment land uses within the perimeters of its policy regarding busing of students, so that students walking to school will not be subjected to confrontation with the existence of adult entertainment land uses.

8. The Renton School District finds that location of adult entertainment land uses in areas of the City which are in close proximity to schools, and commercial areas patronized by students and young people, will have a detrimental effect upon the quality of education which the School District is providing for its students.
9. The Renton School District finds that education of its students will be negatively affected by location of adult entertainment land uses in close proximity to location of schools.
10. Adult entertainment land uses should be regulations by zoning to separate it from other dissimilar uses just as any other land use should be separated from uses with characteristics different from itself.
11. Residents of the City of Renton, and persons who are non-residents but use the City of Renton for shopping and other commercial needs, will move from the community or shop elsewhere if adult entertainment land uses are allowed to locate in close proximity to residential uses, churches, parks and other public facilities, and schools.
12. Location of adult entertainment land uses in proximity to residential uses, churches, parks and other public facilities, and schools, may lead to increased levels of criminal activities, including prostitution, rape, incest and assaults in the vicinity of such adult entertainment land uses.
13. Merchants in the commercial area of the City are concerned about adverse impacts upon the character and quality of the City in the event that adult entertainment land uses are located within close proximity to residential uses, churches, parks and other public facilities, and schools. Location of adult entertainment land uses in close

- proximity to residential uses, churches, parks and other public facilities, and schools, will reduce retail trade to commercial uses in the vicinity, thus reducing property values and tax revenues to the City. Such adverse affect on property values will cause the loss of some commercial establishments followed by a blighting effect upon the commercial districts within the City, leading to further deterioration of the commercial quality of the City.
14. Experience in numerous other cities, including Seattle, Tacoma and Detroit, Michigan, has shown that location of adult entertainment land uses degrade the quality of the area of the City in which they are located and cause a blighting effect upon the City. The skid row effect, which is evident in certain parts of Seattle and other cities, will have a significantly larger affect upon the City of Renton than other major cities due to the relative sizes of the cities.
 15. No evidence has been presented to show that location of adult entertainment land uses within the City will improve the commercial viability of the community.
 16. Location of adult entertainment land uses within walking distance of churches and other religious facilities will have an adverse effect upon the ministry of such churches and will discourage attendance at such churches by the proximity of adult entertainment land uses.
 17. A reasonable regulation of the location of adult entertainment land uses will provide for the protection of the image of the community and its property values, and protect the residents of the community from the adverse effects of such adult entertainment land uses, while providing to those

who desire to patronize adult entertainment land uses such an opportunity in areas within the City which are appropriate for location of adult entertainment land uses.

18. The community will be an undesirable place to live if it is known on the basis of its image as the location of adult entertainment land uses.
19. A stable atmosphere for the rearing of families cannot be achieved in close proximity to adult entertainment land uses.
20. The initial location of adult entertainment land uses will lead to the location of additional and similar uses within the same vicinity, thus multiplying the adverse impact of the initial location of adult entertainment land uses upon the residential [*sic*], churches, parks and other public facilities, and schools, and the impact upon the image and quality of the character of the community.

and

WHEREAS, since the adoption of Ordinance No. 3526, it has come to the attention of the City Council of the City of Renton that it would be appropriate to set forth in writing the findings of fact which were the basis for the adoption by the City Council of Ordinance No. 3526; and

WHEREAS, the City Council finds that, in order to choose the least restrictive alternative available to accomplish the purposes for which Ordinance No. 3526 was adopted, and in [*sic*] include a severability clause which was inadvertently omitted from Ordinance No. 3526, and to make certain other technical amendments to Ordinance No. 3526, that it is necessary for the City Council to adopt legislation amending Ordinance No. 3526 to accomplish the foregoing purposes; and

WHEREAS, the City Council, at its duly called special meeting on February 25, 1982, held a public hearing upon the subject matter of land use regulations of adult motion pictures within the City of Renton, at which public hearing the City Council received comments from the public on that subject matter at which the following testimony was received, which the City Council believes to be true, and which, together with the findings heretofore set forth as the basis for the adoption of Ordinance No. 3256, form the basis for the adoption of this Ordinance:

1. Many parents have chosen the City of Renton in which to raise their families because of the lack of pornographic entertainment outlets with its influence upon children external to the home.
2. Location of adult entertainment land uses on the main commercial thoroughfares of the City gives an impression of legitimacy to, and causes a loss of sensitivity to the adverse affect of pornography upon children, established family relations, respect for marital relationship and for the sanctity of marriage relations of others, and the concept of non-aggressive consensual sexual relations.
3. Citizens from other cities and King County will travel to Renton to view adult film fare away from areas in which they are known and recognized.
4. Property values in the areas adjacent to the adult entertainment land uses will decline, thus causing a blight upon the commercial area of the City of Renton.
5. Location of adult entertainment land uses within neighborhoods and commercial areas of the City of Renton is disrupting to youth programs such as Boy Scouts, Cub Scouts and Campfire Girls. Many such youth programs use the commercial

areas of the City as a historical research resource. Location of adult entertainment land uses in close proximity to residential uses, churches, parks and other public facilities and schools is inappropriate.

6. Location of adult entertainment land uses in close proximity to residential uses, churches, parks and other public facilities, and schools, will cause a degradation of the community standard of morality. Pornographic material has a degrading effect upon the relationship between spouses.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF RENTON, WASHINGTON DO ORDAIN AS FOLLOWS:

SECTION I: Existing Section 4-702 of Title IV (Building Regulations) of Ordinance No. 1628 entitled "Code of General Ordinances of the City of Renton" is hereby amended by adding the following subsections:

"Used" The word "used" in the definition of "Adult motion picture theater" herein, describes a continuing course of conduct of exhibiting "specific sexual activities" and "specified anatomical area in a manner which appeals to a prurient interest.

SECTION II: Existing Section 4-735 of Title IV (Building Regulations) of Ordinance No. 1628 entitled "Code of General Ordinances of the City of Renton" is hereby amended by adding the following subsections:

(C) Violation of the use provisions of this section is declared to be a public nuisance per se, which shall be abated by City Attorney by way of civil abatement procedures only, and not by criminal prosecution.

(D) Nothing in this section is intended to authorize, legalize or permit the establishment, operation or maintenance of any business, building or use which violates any

City of Renton ordinance or statute of the State of Washington regarding public nuisances, sexual conduct, lewdness, or obscene or harmful matter or the exhibition or public display thereof.

SECTION III: Existing subsection (A)(2) of Section 4-735 of Title IV (Building Regulations) of Ordinance No. 1628 entitled "Code of General Ordinances of the City of Renton" is hereby amended to read as follows:

2. One thousand feet (1,000') of any public or private school.

SECTION IV: City of Renton Ordinance No. 3526 is hereby amended by adding the following section to read as follows:

If any section, subsection, sentence, clause, phrase or any portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court or competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council of the City of Renton hereby declares that it would have adopted City of Renton Ordinance No. 3526 and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases or portions be declared invalid or unconstitutional.

SECTION V: In any section, subsection, sentence, clause, phrase or any portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council of the City of Renton hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases or portions be declared invalid or unconstitutional.

SECTION VI: This ordinance shall be effective upon its passage, and approval and thirty (30) days after its publication.

PASSED BY THE CITY COUNCIL this 14th day of June, 1982.

/s/ Delores A. Mead
DELORES A. MEAD
City Clerk

APPROVED BY THE MAYOR this 14th day of June, 1982.

/s/ Barbara Y. Shinpoch
BARBARA Y. SHINPOCH
Mayor

Approved as to form:

/s/ Lawrence J. Warren
LAWRENCE J. WARREN
City Attorney

Date of Publication: June 18, 1982

APPENDIX O

ORDINANCE NO. 742-G

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

Section 1. That Ordinance No. 390-G, entitled: "An Ordinance to establish districts in the City of Detroit; to regulate the use of land and structures therein, to regulate and limit the heighth, the area, the bulk and location of buildings; to regulate and restrict the location of trades and industries and the location of buildings designed for specified uses; to regulate and determine the area of yards, courts and other open spaces; to regulate the density of population; to provide for the establishment of a program to develop and upgrade the appearance of places of businesses or other establishments and to provide a local assessment district for the payment of the cost of such improvements according to the benefits to be derived therefrom; to provide for the administration and enforcement of this Ordinance; to provide for a Board of Appeals, and its powers and duties; and to provide a penalty for the violation of the terms thereof," as amended, be and the same is hereby amended by adding new sections to be known as Section 32.0007, 32.0023, and 66.0103 and by amending Sections 66.0000, 66.0101, 66.0102, 94.0300, 95.0300, 101.0100 and 102.0100, to read as follows:

Section 32.0007 Adult

Adult Book Store

An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

Adult Motion Picture Theater

An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below) for observation by patrons therein.

Adult Mini Motion Picture Theater

An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting describing, or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below), for observation by patrons therein.

For the purpose of this Section, "Specified Sexual Activities" is defined as:

1. Human Genitals in a state of sexual stimulation or arousal;
2. Acts of human masturbation, sexual intercourse or sodomy;
3. Fondling or other erotic touching of human genitals, public region, buttock or female breast.

And "Specified Anatomical Areas" is defined as:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Section 32.0023 Cabaret

Group "D" Cabaret

A cabaret which features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers.

66.0000 Regulated Uses

In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area (i.e. not more than two such uses within one thousand feet of each other which would create such adverse effects).

Uses subject to these controls are as follows:

Adult

Adult Book Store

Adult Motion Picture Theater

Adult Mini Motion Picture Theater

Cabaret

Group "D" Cabaret

Establishments for the sale of beer or intoxicating liquor for consumption on the premises.

Hotel or motels

Pawnshops

Pool or billiard halls

Public lodging houses

Secondhand stores

Shoeshine parlors

Taxi dance halls

Section 66.0101.

The Commission may waive this locational provision for Adult Book Stores, Adult Motion Picture Theaters, Adult Mini Motion Picture Theaters, Group "D" Cabaret, hotels or motels, pawnshops, pool or billiard halls, public lodging houses, second hand stores, shoeshine parlors, or taxi dance halls if the following findings are made:

- a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.
- b) That the proposed use will not enlarge or encourage the development of a "skid row" area.
- c) That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any program of urban renewal.
- d) That all applicable regulations of this Ordinance will be observed.

Section 66.0102

For establishments for the sale of beer or intoxicating liquor for consumption on the premises, the Common Council may waive the locational requirements if the findings required in Section 66.0101 (a) through (d) can be made or waived for just cause and after receiving a report and recommendations from the City Plan Commission.

Section 66.0103

It shall be unlawful to hereafter establish any Adult Book Store, Adult Motion Picture Theater, Adult Mini Theater or Class "D" Cabaret within 500 feet of any building containing a residential, dwelling or rooming unit. This prohibition may be waived if the person applying for the waiver shall file with the City Plan Commission a petition which indicates approval of the proposed regulated use by 51 per cent of the persons owning, residing or doing business within a radius of 500 feet of the location of the proposed use, the petitioner shall attempt to contact all eligible locations within this radius, and must maintain a list of all addresses at which no contact was made.

The Commissioner of the Department of Buildings and Safety Engineering shall adopt rules and regulations governing the procedure for securing the petition of consent provided for in this section of the ordinance. The rules shall provide that the circulator of the petition requesting a waiver shall subscribe to an affidavit attesting to the fact that the petition was circulated in accordance with the rules of the Department of Buildings and Safety Engineering and that the circulator personally witnessed the signatures on the petition and that the same were affixed to the petition by the person whose name appeared thereon.

The City Plan Commission shall not consider the waiver of locational requirements set forth in Section 66.0000 to 66.0102 until the above described petition shall have been filed and verified.

94.0300 Permitted with Approval Uses

The following uses, and uses accessory thereto, shall be permitted by the Commission, or Council if specified, and subject to compliance with the provisions and standards as set forth in Article VI, Section 65.0000 and to all conditions hereinafter listed.

Adult

Adult Book Stores as regulated by Section 66.0000.

Adult Motion Picture Theater as regulated by Section 66.0000.

Adult Mini Motion Picture Theater as regulated by Section 66.0000.

Cabaret

Group "D" Cabaret as regulated by Section 66.0000.

Confection manufacture.

Dental products, surgical, or optical goods manufacture.

Fraternity or sorority houses.

Go-Cart tracks, subject to the following requirements, except as may be adjusted by the Commission:

- a) Parking areas shall be surfaced with gravel, slag, or other comparable material and treated so as to prevent the raising of dust.
- b) Ingress or egress shall be only from the principal street side of the property as may be determined by the Commission.
- c) If lighting is provided, all such lighting shall be subdued, shaded, and focused away from all dwellings.
- d) An opaque fence or wall of wood or masonry construction, six feet in height, shall be constructed between the approved site and any adjacent property zoned in a residential district classification. If such fence is of wood construction, the design and type of fence shall be subject to the approval of the Commission.
- e) In all instances where a wall or fence is required, said wall or fence shall be protected from possible damage inflicted by vehicles using the parking area

by means of precast concrete wheel stops at least six inches in height, or by firmly implanted bumper guards not attached to the wall or fence, or by other suitable barriers.

- f) No part of the driving track shall be within 300 feet of property zoned in a residential district classification.
- g) Any track surface or other area to be used for the operation of a go-cart shall be of an asphaltic or concrete material.
- h) All light standards, poles, or other appurtenances shall be effectively padded or screened so as to prevent injury to drivers of the vehicles; baled hay or other suitable shock absorbing material shall be placed around all turns or curves in the track.
- i) All vehicles shall be provided with mufflers to eliminate objectionable noise. The Commission may require a change in mufflers to reduce exhaust noises, if, in its opinion, such noise becomes a nuisance.
- j) Permitted hours of operation shall be 10:00 A.M. to 10:00 P.M. Monday through Saturday, and 12:00 noon to 10:00 P.M. on Sundays.

Jewelry manufacture

Lithographing

Miniature golf courses, subject to the following requirements, except as may be adjusted by the Commission:

- a) Parking areas shall be surfaced with gravel, slag, or other comparable material and treated so as to prevent the raising of dust.
- b) Ingress and egress shall be only from the principal street side of the property as may be determined by the Commission.

- c) If lighting is provided, all such lighting shall be subdued, shaded, and focused away from all dwellings.
- d) An opaque fence or wall of wood or masonry construction, six feet in height, shall be constructed between the approved site and any adjacent property zoned in a residential district classification. If such fence is of wood construction, the design and type of fence shall be subject to the approval of the Commission.
- e) In all instances where a wall or fence is required, said wall or fence shall be protected from possible damage inflicted by vehicles using the parking area by means of precast concrete wheel stops at least six inches in height, or by firmly implanted bumper guards not attached to the wall or fence, or by other suitable barriers.
- f) Loudspeakers or public address systems may be used only for control purposes, shall play no music, and shall be removed if, in the opinion of the Commission, such operation constitutes a nuisance.
- g) No part of the playing surface of a miniature golf course shall be located within fifty (50) feet of any property zoned in a residential district classification.
- h) Permitted hours of operation shall be 8:00 A.M. to 10:30 P.M. Monday through Saturday, and 12:00 noon to 10:30 P.M. Sunday.

Motels or hotels as regulated by Section 66.0000

Motor vehicle body or fender bumping and painting shops and major motor repairing provided that all operations are conducted entirely within a building, and further provided that any wall facing, abutting, or adjacent to residentially zoned property shall consist of a solid blank wall with no openings whatsoever, excepting that a

required secondary exit door, of minimum requirements, shall be permitted and provided further, that all open storage vehicles awaiting repairs or service be enclosed by an opaque wall or fence of masonry or wood construction six feet in height and maintained in a neat and orderly fashion at all times.

Multiple family dwellings, which may contain non-residential uses as specified in Article VIII, Section 86.0113.

Photoengraving.

Printing or engraving shops

Public lodging houses, as regulated by Section 66.000

Rebound tumbling centers, subject to the following requirements, except as may be adjusted by the Commission:

- a) Parking areas shall be surfaced with gravel, slag, or other comparable material and treated so as to prevent the raising of dust.
- b) Ingress and egress shall be only from the principal street side of the property as may be determined by the Commission.
- c) If lighting is provided, all such lighting shall be subdued, shaded, and focused away from all dwellings.
- d) An opaque fence or wall of wood or masonry construction, six feet in height, shall be constructed between the approved site and any adjacent property zoned in a residential district classification. If such fence is of wood construction, the design and type of fence shall be subject to the approval of the Commission.
- e) In all instances where a wall or fence shall be protected from possible damage inflicted by vehicles using the parking area by means of precast concrete

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wheel stops at least six inches in height, or by firmly implanted bumper guards not attached to the wall or fence, or by other suitable barriers.

- f) Loudspeakers or public address systems may be used only for control purposes, shall play no music, and shall be removed if, in the opinion of the Commission, such operation constitutes a nuisance.
- g) No rebound tumbling apparatus or part thereof shall be located within one hundred feet of any property zoned in a residential district classification.
- h) Permitted hours of operation shall be 8:00 A.M. to 10:30 P.M. Monday through Saturday, and 12:00 noon to 10:30 P.M. Sunday.

Residential uses combined in structures with permitted commercial or other uses

Restaurants, drive-in, when located on a street designated on the master plan of trafficways as a major thoroughfare, subject to the following requirements except as may be adjusted by the Commission or Council:

- a) An unpierced masonry wall or opaque wood fence six feet in height shall be provided on all sides of the premises so used; provided, that in all instances where a wall or fence is required, said wall or fence shall be protected from possible damage inflicted by vehicles using the parking area by means of pre-cast concrete wheel stops at least six inches in height, or by firmly implanted bumper guards not attached to the wall or fence, or by other suitable barriers.
- b) On the side of the property abutting the access street, the above described wall or opaque wood fence may be reduced to a height of three feet six inches.
- c) Wire mesh fencing not exceeding two inch mesh and made of number nine or heavier wire may be used

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in lieu of a masonry wall on those lot lines not adjacent to a street or alley but contiguous to property zoned in a business or industrial district classification.

- d) No fence or wall shall be required on that portion of a lot line where there is a building or structure serving the purpose of a fence or wall. Any such building or structure located on adjacent property shall be protected from damage as specified in a) above.
- e) The entire parking area shall be paved with a permanent surface of concrete or asphaltic cement and shall be graded and drained in accordance with the city plumbing code. Any unpaved area of the site shall be landscaped with lawn or other horticultural materials, maintained in a neat and orderly fashion at all times, and separated from the paved area by a raised curb or other equivalent barrier.

And Provided, that a written report of the Commission's decision shall be filed with the Common Council, which shall become final 30 days after the filing thereof unless within that time a protest against such decision is filed with the Council signed by the applicant or by an owner of property within 300 feet of the premises in question. In such event the Council shall, by resolution, approve or disapprove such use.

Rooming houses

Single or two-family dwellings, which may contain home occupations as regulated in Section 83.0105, paragraphs b through h

Special small tool, die, and gauge manufacturing employing not more than 15 persons in manufacturing operations, Provided, that a written report of the Commission's decision shall be filed with the Common Council, which shall become final 30 days after the filing thereof unless

within that time a protest against such decision is filed with the Council signed by the applicant or by an owner of property within 300 feet of the premises in question. In such event the Council shall, by resolution, approve or disapprove such use.

Taxi dance halls, as regulated by Section 66.0000

Toiletries or cosmetics goods manufacture

Town houses

Wearing apparel manufacture

Wholesaling, warehousing, storage, or transfer buildings, but excluding steel warehousing, storage of bulk petroleum or related products, or garbage or rubbish. All materials must be completely enclosed within a building.

Uses similar to the above specified uses

95.0300 Permitted with Approval Uses

The following uses, and uses accessory thereto, shall be permitted by the Commission, or Council if specified, and subject to compliance with the provisions and standards as set forth in Section 65.0000 and to all conditions hereinafter listed.

Adult

Adult Book Store as regulated by Section 66.0000.

Adult Motion Picture Theater as regulated by Section 66.0000.

Adult Mini Motion Picture Theater as regulated by Section 66.0000.

Cabaret

Group "D" Cabaret as regulated by Section 66.0000.

Heliports, subject to the approval of the Common Council after report and recommendation from the Detroit Aviation Commission and the City Plan Commission and

upon finding that such use is suitable in relation to the features and objectives of the master plan and not contrary to the spirit, intent, and purpose of this district.

Motor vehicle body or fender bumping and painting shops and major motor repairing provided that all operations are conducted entirely within a building, and further, provided, that any wall facing, abutting, or adjacent to residentially zoned property shall consist of a solid blank wall with no openings whatsoever, excepting that a required secondary exit door, of minimum requirements, shall be permitted, and provided further, that all open storage of vehicles awaiting repairs or service shall be enclosed by an opaque wall or fence six feet in height and maintained in a neat and orderly fashion at all times.

Multiple-family dwellings, which may be combined in structures with permitted commercial uses

Public lodging houses, as regulated by Section 66.0000

Rooming houses

Taxi dance halls, as regulated by Section 66.0000

Town houses

Wholesaling, warehousing, storage, or transfer buildings, but excluding steel warehousing, storage of bulk petroleum or related products, or garbage or rubbish. All material must be completely enclosed within a building.

The following manufacturing uses:

Wearing apparel manufacturing

Confection manufacturing

Dental products, surgical, or optical goods manufacturing

Jewelry manufacturing

Toiletries or cosmetic manufacturing

Similar manufacturing uses as determined by the Commission

101.0100 Uses Permitted as a Matter of Right

All uses permitted as a matter of right in the B4 or B5 Districts excepting new residential uses and hospitals or other institutions for the care of humans, hotels or motels; and provided, that the provisions of Section 66.0000 shall also apply to this Section 101.0100.

102.0100 Uses Permitted as a Matter of Right

Uses permitted as a matter of right in the B4 or B5 districts, except public or private elementary, junior high, or high schools; new residential uses; hotels or motels, hospitals or other institutions for the care of humans; and provided, that the provisions of Section 66.0000 shall also apply to this Section 102.0100.

Uses permitted as a matter of right in the B6 district except wholesale or retail produce markets, storage or killing of poultry or small game for retail or wholesale trade, and meat or fish products manufacture or processing; and provided, that the provisions of Section 66.0000 shall also apply to this Section 102.0100.

Section 2. All ordinances or parts of ordinances in conflict herewith are hereby repealed only to the extent necessary to give this ordinance full force and effect.

(JCC p. 2425-30, October 3, 1972)

Passed October 24, 1972.

Approved October 26, 1972.

Published November 1, 2, 3, 1972.

Effective November 2, 1972.

GEORGE C. EDWARDS
City Clerk

APPENDIX P

AN ORDINANCE to amend Chapter 5, Article 2 of the Code of Detroit by amending Sections 5-2-1.1, 5-2-3 and 5-2-24, and by adding new sections to be known as Sections 5-2-1.2, 5-2-9.1 and 5-2-24.1 to include coin operated motion picture devices, adult motion picture theaters, adult mini motion picture theaters, drive-in theaters and concert halls and setting forth the requirements therefor.

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

Section 1. That Chapter 5, Article 2 of the Code of the City of Detroit be amended by amending Sections 5-2-1.1, 5-2-3 and 5-2-24, and by adding new sections to be known as Sections 5-2-1.2, 5-2-9.1 and 5-2-24.1 to read as follows:

Sec. 5-2-1.1.

No amusement consisting of an amusement park, arcade, archery gallery, baseball batting and practice net, outdoor circus, menagerie or exhibits, concert cafe, concert hall, coin-operated motion picture device, golf school, including driving nets, putting greens, practice driving courses or miniature golf courses, kiddie ride, riding device, shooting gallery, tracks, including bicycles, go-cart, midget auto racing or similar devices, or rebound tumbling or trampoline center shall hereafter be established within the city unless a petition shall be filed with the police department signed by fifty-one per cent of the people living or doing business within a radius of five hundred feet of the premises upon which the amusement is to be established; provided, that miniature golf courses may be established upon the petition of fifty-one per cent of the people living or doing business within a radius of two hundred feet of the premises upon which such miniature golf course is to be established.

It shall be unlawful for any person to hereafter operate an Adult Motion Picture Theater, Adult Mini Motion Picture Theater or Drive-in Theater until he shall have complied with the requirements of the Official Zoning Ordinance, the provisions of this article and other applicable ordinances of the City of Detroit.

Sec. 5-2-1.2. Definitions

For the purpose of this article the following words and phrases shall have the meanings respectively ascribed to them by this section:

Adult Motion Picture Theater:

An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below), for observation by patrons therein.

Adult Mini Motion Picture Theater:

An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below) for observation by patrons therein.

"Specified Sexual Activities":

1. Human genitals in a state of sexual stimulation or arousal;
2. Acts of human masturbation, sexual intercourse or sodomy;
3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

"Specified Anatomical Areas":

1. Less than completely and opaquely covered;

(a) Human genitals, pubic region, (b) buttock, and

(c) female breast below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Sec. 5-2-3.

The Mayor may refuse to issue a license for the operation of any business regulated by this article, and may revoke any license already issued upon proof submitted to him of the violation by an applicant, or licensee, his agent or employee, within the preceding two years, of any criminal statute of the State, or of any ordinance of this city regulating, controlling or in any way relating to the construction, use or operation of any of the establishments included in this article which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby.

Sec. 5-2-9.1

It shall be unlawful for any licensee, his agent or employee to knowingly permit any exhibition or advertising in connection with any establishment regulated under this article depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Area" to be displayed in any manner which is visible from any public street or highway.

Sec. 5-2-24. The license fee for all motion picture theaters, except adult motion picture theaters and adult mini motion picture theaters including all motion picture theaters which, in addition to motion pictures, offer other entertainment, amusement or diversions or which, in addition to motion pictures, offer or exhibit regular stage shows, so-called, or theatricals, shall be based on seating capacity as follows:

(a) Under five hundred seats, fifty-five dollars annually.

(b) Five hundred to one thousand seats, seventy dollars annually.

(c) One thousand one to two thousand seats, ninety-five dollars annually.

(d) Over two thousand seats, one hundred seventy dollars annually.

Sec. 5-2-24.1. The license fee for all adult motion picture theaters and adult mini motion picture theaters, including those which, in addition to adult motion pictures offer other entertainment, amusement or diversions or which, in addition to adult motion pictures offer or exhibit regular stage shows so-called, or theatricals, shall be based on seating capacity as follows:

(A) Adult mini motion picture theaters having less than fifty seats, fifty-five dollars annually.

(B) Adult motion picture theaters:

1. Fifty to five hundred seats, fifty-five dollars annually.
2. Five hundred one to one thousand seats, seventy dollars annually.
3. One thousand one to two thousand seats, ninety-five dollars annually.
4. Over two thousand seats, one hundred seventy dollars annually.

Section 2. This ordinance is declared necessary for the preservation of the public peace, health, safety and welfare of the people of the City of Detroit and is hereby given immediate effect.

Section 3. All ordinances or parts of ordinances in conflict herewith are hereby repealed only to the extent necessary to give this ordinance full force and effect.

(JCC p. 2430-32, October 3, 1972)

Passed October 24, 1972.

Approved October 26, 1972.

Published November 1, 2, 3, 1972.

Effective November 2, 1972.

GEORGE C. EDWARDS
City Clerk

APPENDIX Q

ORDINANCE NO. 891-G

CHAPTER 68

AMENDMENT TO TEXT OF ZONING ORDINANCE

Requirement of consent of 51% of adjacent property owners to waive prohibition against establishment of adult businesses in certain areas of city.

AN ORDINANCE to amend Ordinance No. 390-G, entitled: "An Ordinance to establish districts in the City of Detroit; to regulate the use of land and structures therein; to regulate and limit the height, the area, the bulk and location of buildings; to regulate and restrict the location of trades and industries and the location of buildings designed for specified uses; to regulate and determine the area of yards, courts and other open spaces; to regulate the density of population; to provide for the establishment of a program to develop and upgrade the appearance of places of businesses or other establishments and to provide a local assessment district for the payment of the cost of such improvements according to the benefits to be derived therefrom; to provide for the administration and enforcement of this Ordinance; to provide for a Board of Appeals, and its powers and duties; and to provide a penalty for the violation of the terms thereof," as amended, by amending Sections 66.0103, 101.0300, 102.0300 and 104.0100.

WHEREAS, It has been demonstrated that the establishment of adult businesses in business districts, which are immediately adjacent to and which serve residential neighborhoods, has a deleterious effect on both the business and residential segments of the neighborhood, causing blight and a downgrading of property values; and

WHEREAS, The prohibition against the establishment of more than two regulated uses within 1,000 feet of each other serves to avoid the clustering of certain businesses which, when located in close proximity to each other, tend to create a "skid row" atmosphere; and

WHEREAS, Such prohibition fails to avoid the deleterious effects of blight and devaluation of both business and residential property values resulting from the establishment of an adult book store, adult motion picture theatre, adult mini motion picture theatre or Group "D" cabaret in a business district which is immediately adjacent to and which serves residential neighborhoods; and

WHEREAS, Concern for, and pride in, the orderly planning and development of a neighborhood should be encouraged and fostered in those persons who comprise the business and residential segments of that neighborhood; and

WHEREAS, Those business districts in the City of Detroit which serve residential areas (and the downtown loop area which serves the whole city), are designated as B1, B2, B3, B4, B5, and B6 zoned districts; and

WHEREAS, Adult motion picture theatres, adult mini motion picture theatres, adult book stores and Group "D" cabarets are not permitted in B1, B2 or B3 zoned districts, and are only permitted with the approval of the City Plan Commission in B4, B5 and B6 zoned districts; and

WHEREAS, the City Plan Commission should be guided by the expressed will of those businesses and residents which are immediately adjacent to the proposed location of, and therefore most affected by the existence of, any adult motion picture theatre, adult mini motion picture theatre, adult book store or Group "D" cabaret in a B4, B5 or B6 zoned district;

IT IS HEREBY ORDAINED BY THE PEOPLE OF
THE CITY OF DETROIT:

Section 1. That Ordinance No. 390-G, entitled: "An Ordinance to establish districts in the City of Detroit; to regulate the use of land and structures therein; to regulate and limit the height, the area, the bulk and location of buildings; to regulate and restrict the location of trades and industries and the location of buildings designed for specified uses; to regulate and determine the area of yards, courts and other open spaces; to regulate the density of population; to provide for the establishment of a program to develop and upgrade the appearance of places of businesses or other establishments and to provide a local assessment district for the payment of the cost of such improvements according to the benefits to be derived therefrom; to provide for the administration and enforcement of this Ordinance; to provide for a Board of Appeals, and its powers and duties; and to provide a penalty for the violation of the terms thereof," as amended, be and the same is hereby amended by amending Sections 66.0103, 101.0300, 102.0300, and 104.0100, to read as follows:

Section 66.0103

It shall be unlawful to hereafter establish any Adult Bookstore, Adult Motion Picture Theatre, Adult Mini Motion Picture Theatre or Group "D" Cabaret in a B4, B5 or B6 Zoned District if the proposed location is within 500 feet of a Residentially Zoned District. This prohibition shall be waived upon the presentment to the City Plan Commission of a validated petition requesting such waiver, signed by 51% of those persons owning, residing, or doing business within 500 feet of the proposed location.

The Commissioner of the Department of Buildings and Safety Engineering shall adopt rules and regulations governing the procedure for securing the petition of consent provided for in this section of the ordinance. The rules

shall provide that the circulator of the petition requesting a waiver shall subscribe to an affidavit attesting to the fact that the petition was circulated in accordance with the rules of the Department of Buildings and Safety Engineering and that the circulator personally witnessed the signatures on the petition and that the same were affixed to the petition by the person whose name appeared thereon.

The City Plan Commission shall not consider the waiver of locational requirements set forth in Sections 66.0000 to 66.0102 until the above described petition, if required shall have been filed and verified.

Section 101.0300

The following uses, and uses accessory thereto, shall be permitted by the Commission, or Council if specified, and subject to compliance with the provisions and standards as specified in Section 65.0000 and to all conditions hereinafter listed.

Adult

Adult Book Stores as regulated by Section 66.0000.

Adult Motion Picture Theaters as regulated in Section 66.0000.

Adult Mini Motion Picture Theaters as regulated by Section 66.0000.

Cabaret

Group "D", Cabarets as regulated by Section 66.0000.

Uses permitted as a matter of right in the M2 district
Hotels or motels as regulated by Section 66.0000

Section 102.0300

The following uses and uses accessory thereto shall be permitted by the Commission, or Council if specified, and subject to compliance with the provisions and standards

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as set forth in Article VI, Section 65.0000 and to any other conditions hereinafter listed. For heliports and industrial uses, the Commission may approve the use only after a report and recommendation has been received from the Industrial Review Committee.

Any use permitted as a matter of right in the M3 district

Adult

Adult Book Stores as regulated by Section 66.0000.

Adult Motion Picture Theaters as regulated by Section 66.0000.

Adult Mini Motion Picture Theaters as regulated by Section 66.0000.

Cabaret

Group "D", Cabarets as regulated by Section 66.0000.

Heliports

Hotels or motels

Section 104.0100

Uses permitted as a matter of right in the M3 District

Adult

Adult Book Stores as regulated by Section 66.0000.

Adult Motion Picture Theaters as regulated by Section 66.0000.

Adult Mini Motion Picture Theaters as regulated by Section 66.0000.

Cabaret

Group "D" Cabarets as regulated by Section 66.0000

Abrasives manufacture

Acetylene manufacture

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Ammonia manufacture

Annealing or heat treating plants

Balls or bearings manufacture

Battery rebuilding

Bed spring manufacture

Bleaching powder manufacture

Boiler works

Bolts or nuts manufacture

Brick or building block manufacture

Candle manufacture

Carbonic gas manufacture or storage

Carbonic ice manufacture

Cattle or sheep dip manufacture

Cellophane or celluloid manufacture

Ceramic products manufacture

Chlorine gas manufacture

Clay products manufacture

Concrete batching plants

Concrete pipe or concrete pipe products manufacture

Dextrine manufacture

Docks (waterway shipping)

Dyestuffs manufacture

Elevators, grain

Engine manufacture

Feed or grain mill

Felt manufacture

Glass manufacture

Glucose manufacture
 Graphite manufacture
 Gutta percha manufacture or treatment
 Ink manufacture (from basic substance)
 Jute fabrication
 Open storage of equipment or supplies for building or
 construction contractors
 Pharmaceutical products manufacture
 Phenol manufacture
 Proxylin plastic manufacture or processing
 Roofing materials manufacture excluding tar products
 Rope manufacture
 Rug manufacture
 Salt works
 Sewage disposal plants
 Shoe polish manufacture
 Soap manufacture
 Starch manufacture
 Steam generating plants
 Sugar refining
 Terra cotta manufacture
 Tire manufacture
 Turpentine manufacture
 Wallboard manufacture
 Wholesaling, warehousing, storage, or transfer building
 Wire manufacture
 Yeast manufacture

Uses similar to the above specified uses

Accessory uses, incidental to and on the same zoning lot as the principal use

Section 2. This Ordinance is declared necessary for the preservation of the public peace, health, safety, and welfare of the people of the City of Detroit and is hereby given immediate effect.

(JCC p. 707-710, April 2, 1974).

Passed April 23, 1974.

Approved April 30, 1974

Published May 1, 2, 3, 1974.

Effective May 2, 1984.

JAMES H. BRADLEY
 City Clerk

APPENDIX R

ORDINANCE NO. 105565

AN ORDINANCE relating to land use and zoning; amending Section 3.21, 5.3, 16.2 and 17.2 of the Zoning Ordinance (86300) to define "adult motion picture theater", to permit such use only in the BM, CM and CMT zones, and to provide for termination of such uses in all other zones.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. That Section 3.21 of the Zoning Ordinance (86300), as last amended by Ordinance 98426, is further amended to read as follows:

THEATER, ADULT MOTION PICTURE

An enclosed building used for presenting motion picture films distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", as hereinafter defined, for observation by patrons therein:

"Specified Sexual Activities":

1. *Human genitals in a state of sexual stimulation or arousal;*
2. *Acts of human masturbation, sexual intercourse or sodomy;*
3. *Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.*

"Specified Anatomical Areas":

1. *Less than completely and opaquely covered:*
 - (a) *Human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and*

2. *Human male genitals in a discernibly turgid state, even if completely and opaquely covered.*

TOWER STRUCTURE

A building or building part, more than sixty (60) feet in height and normally residential in design, which may or may not be built on top of a base structure.

TRADE OR BUSINESS SCHOOL

An establishment conducted as a commercial enterprise for teaching trades, business or secretarial courses, instrumental or vocal music, art, dancing, barbering or hairdressing or for teaching similar skills.

TRAILER HOUSE (See House Trailer)

TRAILER PARK

Any lot or any portion of any lot used or offered for use for the accomodation of inhabited house trailers for compensation.

TRUCK AND TRAILER SALES LOT

An outdoor area used for the display, sale or rental of new or used trucks or truck trailers, where no repair work is done except minor incidental repair to vehicles to be displayed, sold or rented on the premises.

Section 2. That Section 5.3 of the Zoning Ordinance (86300), as last amended by Ordinance 104971, is further amended to read as follows:

Section 5.3 Nonconforming Uses and Buildings

5.31 Continuing Existing Use

Any nonconforming building or use may be continued, subject, however, to provisions of Section 5.3.

5.32 Buildings Nonconforming as to Bulk

Any building conforming as to use but which is a building nonconforming as to bulk as of the effective date of this Ordinance may be altered, repaired or extended; provided, that such alteration, repair or extension does not cause such building to further exceed the bulk provisions of this Ordinance.

5.33 Termination of certain Nonconforming Uses

- (a) Any nonconforming use not involving a structure or one involving a structure having assessed value of less than one hundred dollars (\$100) on the effective date of this Ordinance may be continued for no longer than one year after said date, and any nonconforming use involving a structure having an assessed value of more than one hundred dollars (\$100) but less than three hundred dollars (\$300) on the effective date of this Ordinance may be continued no longer than two years after said date; provided, however, the above provisions shall not apply to any nonconforming advertising sign.
- (b) All advertising signs in R and BN Zones which have been nonconforming uses for a period of three or more years prior to July 1, 1962, shall be discontinued by July 1, 1963, and all other nonconforming advertising sign uses in R and BN Zones shall be discontinued within three years of the date such sign became or becomes a nonconforming use; provided, that such time limitations may be extended for periods of not to exceed two years at a time by the Superintendent of Buildings, upon application by the owner of such sign and payment of a Twenty-five Dollar (\$25.00) filing fee, if said Superintendent finds that such nonconforming use is on a lot with or adjacent to and fronting on

the same street with uses (other than another advertising sign) which are first permitted in BC or more intensive zones or that such nonconforming use is on a lot separated from the nearest portion of an existing R or BN use by a grade equal to the height of the sign above the ground, and further finds that continuance of such nonconforming sign will not be materially detrimental to the public welfare or injurious to property in the zone or vicinity in which the sign is located, and is not otherwise inconsistent with the spirit and purpose of the Zoning Ordinance and that such advertising sign has been and will be properly maintained. Decisions of said Superintendent hereunder shall be final, subject to review by the City Council upon application.

- (c) Advertising signs in all zones other than the M, IG, and IH Zones which are nonconforming because located upon and supported by a roof or parapet of a building or structure shall be discontinued and removed upon notification in writing within a period of from three to seven years from August 1, 1975 or from the date such sign became or becomes nonconforming in accordance with an amortization schedule established by the Superintendent and based upon the age, condition, cost, and remaining useful life of the sign.
- (d) *Adult Motion Picture Theaters which are nonconforming in the zone in which located shall be discontinued within 90 days of the date the use became or becomes nonconforming.*

5.34 Limitations on Nonconforming Uses

- (a) Subject to Section 5.33, any nonconforming building or part may be maintained with or

dinary repair provided, however, no such building or part shall be extended, expanded or structurally altered, except as otherwise required by law, nor shall a nonconforming use be extended or expanded, provided further, that nothing in this Ordinance shall prevent the restoration of a nonconforming building destroyed by fire or other act of God.

- (b) Any change of a nonconforming use in a conforming building shall be to a conforming use.
- (c) Except as provided in Section 5.34(d) or (e), a nonconforming use in a nonconforming building or part may be changed only to a use permitted in a less intensive zone than said nonconforming use.
- (d) A nonconforming building or part which has been unoccupied continuously for one (1) year or more shall not be reoccupied except by a conforming use.
- (e) In any zone, except an M or I Zone, a nonconforming use in a nonconforming building, may be changed to a use permitted in a less intensive zone than the zone in which the nonconforming use would be conforming, or to another use which is listed and grouped in the same zone classification as an outright permitted use, provided such new use will be no more detrimental or injurious than the previous nonconforming use to other property in the same zone or vicinity.

5.35 Existing Automobile Service Stations

Existing automobile service stations may be extended, expanded or structurally altered in the BN and more intensive zones without obtaining conditional use authorization from the *Hearing Examiner*

or Board where the estimated cost of such improvements within any 12 month period does not exceed 25 percent of the true and fair market value of such automobile service station as computed from the assessed value of the existing use.

Section 3. That Section 16.2 of the Zoning Ordinance (86300), as last amended by Ordinance 94036, is divided into Sections designated Section 16.20 through 16.23 and further amended to read as follows:

Section 16.20 Principal use permitted outright shall be as set forth in Sections 16.21 through 16.23 of this Article. Reference in other sections of this Ordinance to "Section 16.2" shall mean and include Sections 16.20 through 16.23, inclusive.

Section 16.21 The following uses:

- (a) Window displays.
- (b) Retail store.
- (c) Personal service establishment, such as beauty shop, barber shop and shoe repair shop.
- (d) Restaurant, cafe, or establishment selling alcoholic beverages for consumption on the premises with or without live entertainment or dancing; taverns, package liquor stores.
- (e) Bank or other financial institution.
- (f) Hotel, Motel.
- (g) Transportation ticket office, travel agency office.
- (h) Private or public art gallery, museum and library.
- (i) Locksmith
- (j) Catering establishment selling at retail.
- (k) Glazed display case.

- (l) Child care nursery.
- (m) Public playground and public park, including customary buildings and activities.
- (n) Theater *and adult motion picture theater*.
- (o) Advertising sign when subject to applicable provisions of this and other Ordinances.
- (p) Automobile rental office.

Section 16.22 Uses permitted when occupying other than street level floor space; or, permitted when occupying street level floor space providing that such use shall be separated from the street by a space occupied or intended to be occupied by uses permitted in Section 16.21, and also separated by a view obscuring wall located across the rear of such permitted uses as specified in Section 16.21:

- (a) Business or Professional office.
- (b) Catering establishment.
- (c) Taxidermy shop.
- (d) Wholesale store, including wholesale storage of the following merchandise: jewelry, optical and photographic goods, pharmaceuticals, and cosmetics, and other similar high value, low bulk articles.
- (e) Telephone exchange, static transformer and booster station, and other public utility service use.
- (f) Meeting hall, auditorium, theater, bowling lane, skating rink, pool hall, dance hall.
- (g) Radio and television studio.
- (h) Appliance repair.

Section 16.23 Uses permitted when occupying other than street level floor space:

- (a) Uses permitted in Sections 16.21 and 16.22 without specified limitations.
- (b) Trade or business school.
- (c) Custom manufacture for sale at retail on the premises of articles or merchandise from the following previously prepared materials: bone, canvas, cellophane, cloth, cork, feathers, felt, fiber, fur, glass, hair, horn, leather, paper, plastics, precious or semi-precious metals or stones, sheet metal (excluding stampings of metal heavier than fourteen (14) gauge), shell, textiles, tobacco, wax, wire, wood and yarns.
- (d) Experimental or testing laboratory which does not employ machinery or equipment prohibited by Section 16.7(b).
- (e) Private or fraternal club, lodge, social or recreational building with dining and other social facilities.
- (f) Art, dance, and/or music school or studio.
- (g) Printing and publishing establishment.
- (h) Manufacture of musical instruments, except pianos and organs; toys, novelties, rubber or metal stamps, or other small moulded rubber products; pottery and figurines or other similar ceramic products from previously pulverized clay, kilns to be fired by electricity or gas.
- (i) Manufacture or assembly of electrical appliances, electronic instruments and devices, and radios and phonographs.

Section 4. That Section 17.21 of the Zoning Ordinance, as last amended by Ordinance 104423, is further amended to read as follows:

Section 17.21 The following uses:

- (a) Retail store, business and professional office, personal service establishment, bank or other financial institution, catering establishment, restaurant, cafe, or establishment selling alcoholic beverages for consumption on the premises, with or without live entertainment or dancing, window display space, glazed display case, transportation ticket office, travel agency office, and bakery, provided it sells its products at retail on the premises.
- (b) Hotel, apartment hotel and motel.
- (c) Pool hall, public dance hall, tavern, package liquor store, and other similar enterprises.
- (d) Frozen food lockers, retail ice dispensary, not including ice manufacture, plant nursery including retail sales of products.
- (e) Taxidermy shop, locksmith, appliance repair shop, upholstery establishment, retail pet shop or small animal clinic for out-patient treatment only, retail building supply store, automobile laundry, printing and publishing establishment, and photographic processing laboratory.
- (f) Meeting hall, auditorium, theater, *adult motion picture theater*, bowling lanes, skating rink including outdoor ice-skating rink.
- (g) Automobile and pleasure boat display or sales establishment, automobile repair, minor.
- (h) Automobile rental and sales, provided that any portion of said area not permanently maintained in a landscaped condition shall be graded, drained and surfaced as required in Section 23.41 (c).
- (i) Parking garage and automobile rental garage, commercial parking lot for private passenger

- vehicles only, open structures for parking of private passenger vehicles only.
- (j) Trade or business school, art, dance and/or music school or studio.
- (k) Laundry, dry cleaning, dyeing or rug cleaning plants.
- (l) Warehouse or wholesale store; wholesale office, including wholesale storage of the following merchandise: jewelry, optical and photographic goods, pharmaceuticals, and cosmetics, and other similar high value, low bulk articles.
- (m) Experimental or testing laboratory which does not employ machinery or equipment not permitted in the CM Zone.
- (n) Fire station, public and private art gallery, library, museum, branch telephone exchange, micro-wave or line-of-sight transmission station, static transformer and booster station, and other public utility service uses when necessary due to operating requirements; but not including yards or buildings for service or storage.
- (o) Church, private or fraternal club, lodge, social or recreational building.
- (p) Advertising sign, when subject to applicable provisions of this and other Ordinances.
- (q) Uses permitted in Section 19.22, provided that such uses shall not occupy any street level floor space.
- (r) Public or private park.
- (s) Existing railroad rights of way, including passenger shelter stations but not including switching, storage, freight yards or sidings.
- (t) Radio and television studio.

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Section 5. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed by the City Council the 17 day of May 1976, and signed by me in open session in authentication of its passage this 17 day of May, 1976.

/s/ [Illegible]
President of the City Council.

Approved by me this 28 day of May, 1976.

/s/ WM. UHLMAN
Mayor.

Filed by me this 28 day of May, 1976.

Attest: /s/ [Illegible]
City Comptroller and
City Clerk.

(SEAL)
Published

By /s/ [Illegible]
Deputy Clerk.

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STATE OF WASHINGTON)
COUNTY OF KING) ss
CITY OF SEATTLE)

I, TIM HILL, Comptroller and City Clerk of the City of Seattle, do hereby certify that the within and foregoing is a true and correct copy of the original instrument as the same appears on file, and of record in this department.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of The City of Seattle, this February 4, 1985.

TIM HILL
Comptroller and City Clerk

By: /s/ Linda L. Diaz
Deputy Clerk

APPENDIX S

ORDINANCE 105584

AN ORDINANCE relating to land use and zoning; amending Section 18.7 of the Zoning Ordinance (86300) to prohibit adult motion picture theaters in the CG and all more intensive zones.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. That Section 18.7 of the Zoning Ordinance (86300) is amended to read as follows:

Section 18.7 Prohibited Uses:

(a) Any use other than a permitted CG use, which is permitted in a more intensive zone.

(b) *Adult motion picture theater.*

Section 2. This ordinance shall take effect and be in force thirty days from and after his passage and approval, If approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed by the City Council the 1 day of June, 1976, and signed by me in open session in authentication of its passage this 1 day of June, 1976.

/s/ [Illegible]

President of the City Council.

Approved by me this 7 day of June, 1976.

/s/ WM. UHLMAN
Mayor.

Filed by me this 7 day of June, 1976.

Attest: /s/ [Illegible]

City Comptroller and
City Clerk.

(SEAL)

By /s/ [Illegible]
Deputy Clerk.

STATE OF WASHINGTON)
COUNTY OF KING) ss
CITY OF SEATTLE)

I, TIM HILL, Comptroller and City Clerk of the City of Seattle, do hereby certify that the within and foregoing is a true and correct copy of the original instrument as the same appears on file, and of record in this department.

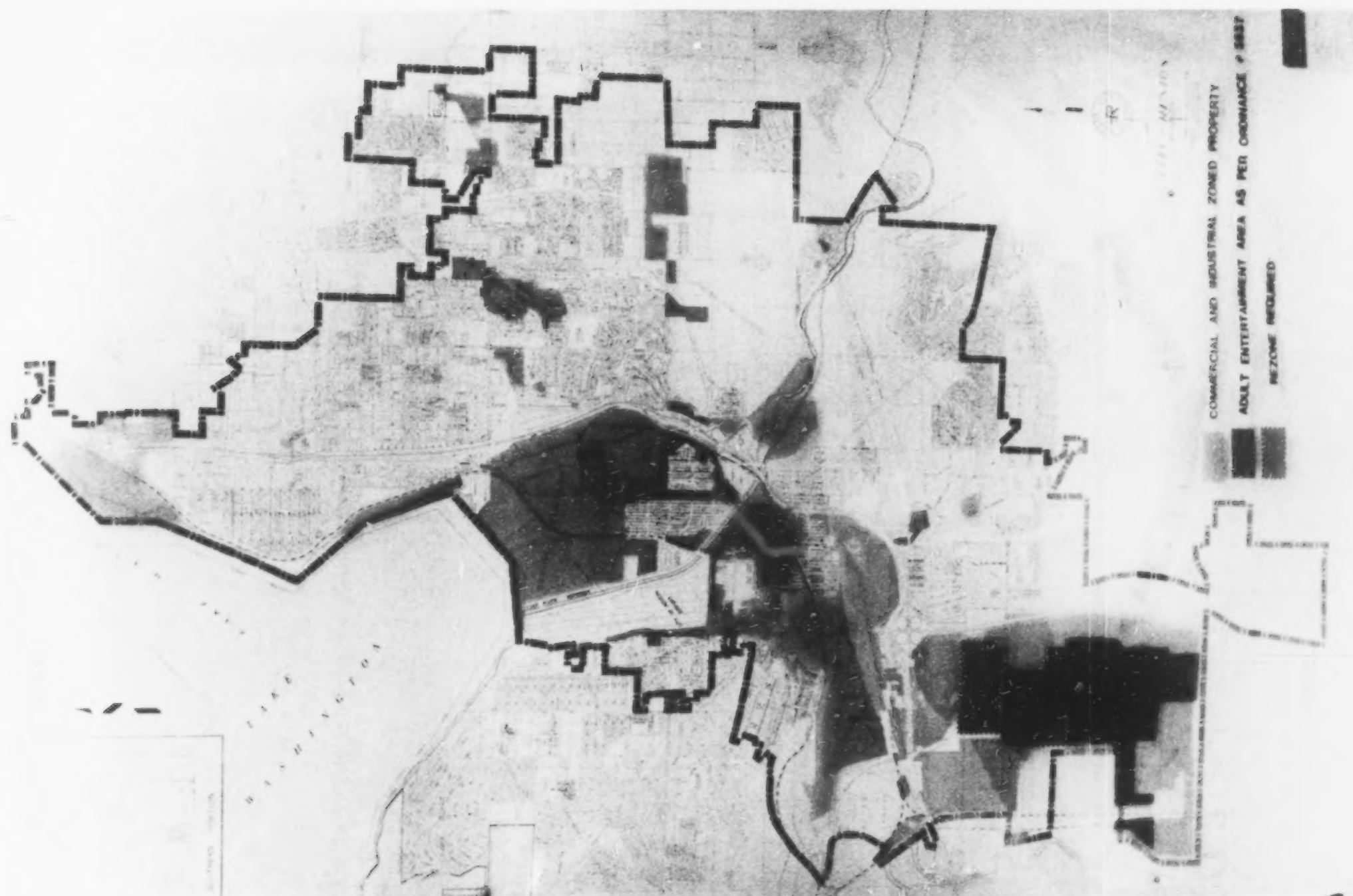
IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of The City of Seattle, this 2-5-1985.

TIM HILL
Comptroller and City Clerk

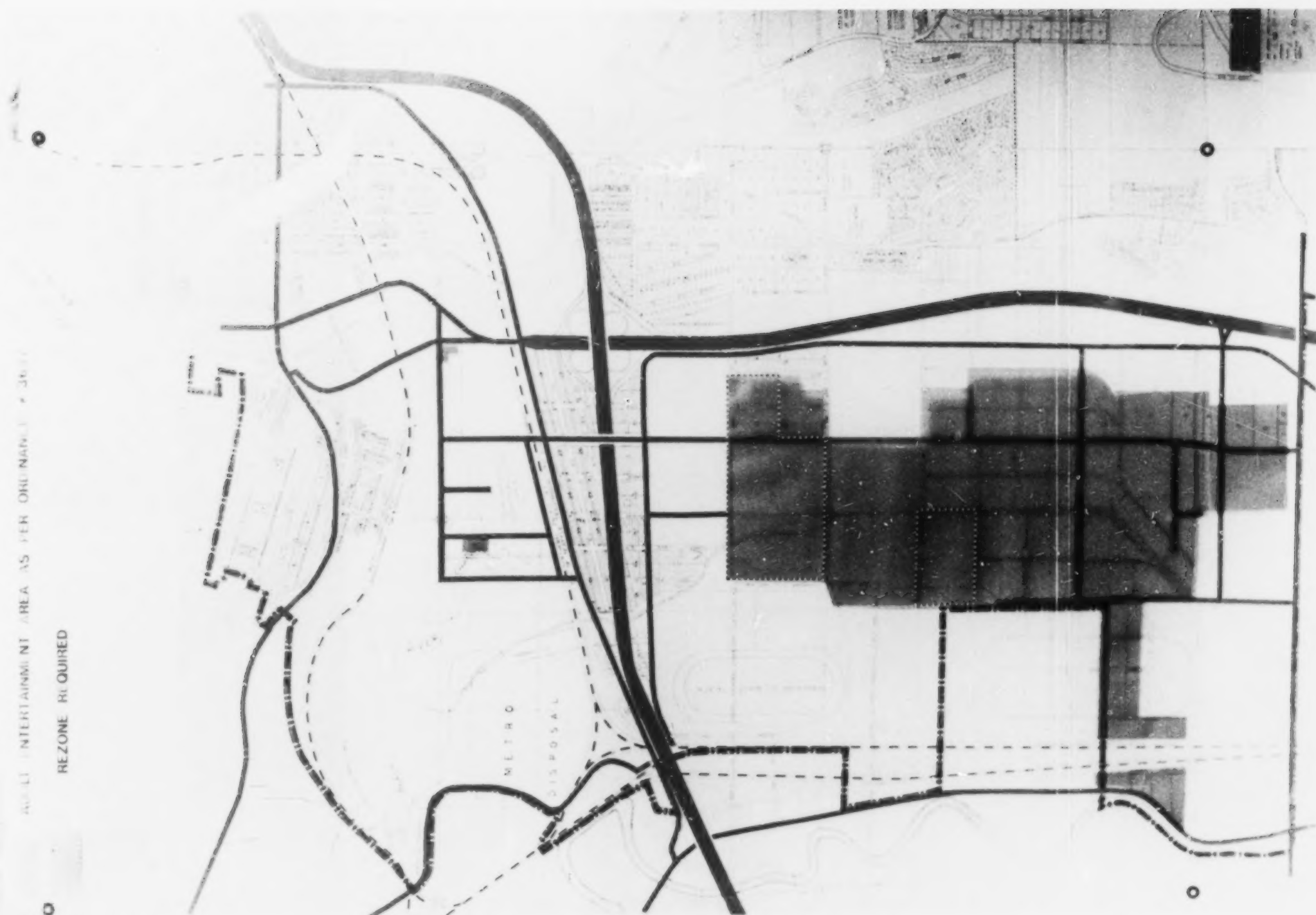
By: /s/ Dorothy J. McFarland
Deputy Clerk

APPENDIX T

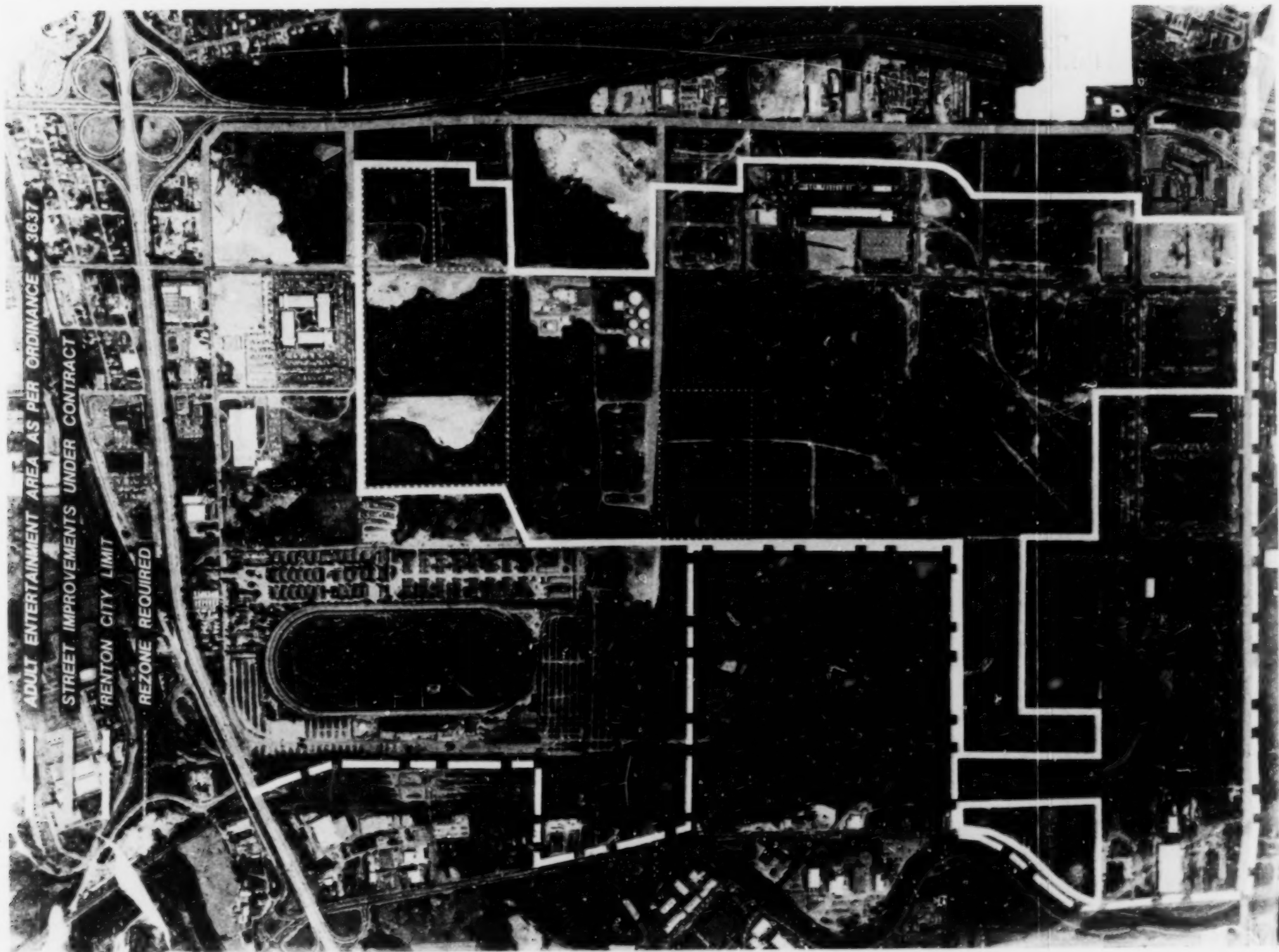
Exhibit A-1



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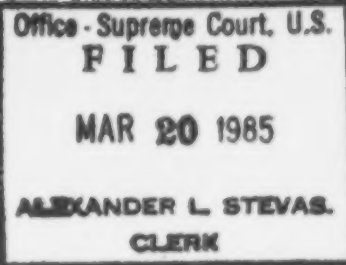


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No. 84-1360

**IN THE SUPREME COURT
of the
UNITED STATES**

October Term, 1984

THE CITY OF RENTON, et al,
Appellants,

vs.

PLAYTIME THEATRES, INC.
a Washington corporation, et al
Appellees.

**On Appeal from the United States Court of Appeals
for the Ninth Circuit**

MOTION TO AFFIRM

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* Counsel of Record

23 pp

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Counsel for Appellees

* Counsel of Record

PARTIES

Appellants: City of Renton; Barbara Y. Shinpoch, Mayor; Earl Clymer, Robert Hughes, Nancy Mathews, John Reed, Randy Rockhill, Richard Stredicke, and Tom Trimm, members of the Renton City Council; and Jim Bourasa, acting Chief of Police of the City of Renton.

Appellees: Sea-First Properties, Inc., f/k/a Kukio Bay Properties, Inc., and Playtime Theatres, Inc., both Washington corporations.

NOTE: The term "aff.," "test.," "dep." refer to "affidavit," "testimony" and "deposition" respectively. "Cl." refers to David R. Clemmens, Renton's Policy Development Director; "Bond" refers to Robert Bond, an executive with Sterling Recreation Organization, a general audience entertainment company operating throughout the Western United States.

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Supreme Court Rule 16.1(c) 1

Supreme Court Rule 16.1(d) 1

MOTION TO AFFIRM

Appellees respectfully move to affirm the judgment of the United States Court of Appeals for the Ninth Circuit pursuant to Supreme Court Rules 16.1(c) and (d).

STATEMENT OF THE CASE**Essential Facts Have Been Misstated By Appellants Which Change The Nature Of The Legal Issues.**

Appellants' statement of the case charts the history of these ordinances, but it contains several glaring misstatements of fact. In the preface to the "Questions Presented," on page (i) of the Jurisdictional Statement, Appellants assert that prior to the entry or attempted entry of any adult motion picture theater, the City effectively set aside 520 acres of developing commercial area for such theaters. This statement is untrue and distorts the history of these ordinances. Ordinance No. 3526, the only ordinance passed before Appellees' entry into the Renton marketplace, provided only 400 acres of total land¹ which included land within the Boeing Aircraft manufacturing facility², the metro sewage treatment plant,³ and the Longacres race track and environs.⁴ As a practical matter, far less land was

¹ Cl. aff., January 27, 1982, at 6.

² Id. attached map, Site A; Cl. test., January 29, 1982, at 14.

³ Cl. aff., January 27, 1982, attached map, Site B; Cl. test., January 29, 1982, at 15.

⁴ Cl. aff., January 27, 1982, attached map, Site D; Cl. test., Jan. 29, 1982, at 19.

actually available, less than 200 acres.⁵ Most of the available land was within a flood plain and further limited by easements for railroad spurs and a natural creek which meandered through the allegedly available land area.⁶

Only after Appellees' lawsuit was commenced did the City of Renton amend Ordinance No. 3526 to reduce the patently unconstitutional restriction on locating nearer than one (1) mile to a school. App. 87a. While this change enlarged the total available area, it did nothing to enhance the quality of the available sites.⁷

Another distortion of the genesis of these ordinances is found on page five (5) of the Jurisdictional Statement, immediately after footnote 6, where

⁵ The planning director acknowledged that all "available" land, as he used the term, was not in fact available. Cl. dep., March 3, 1982, at 38-40. He further testified that already developed land could not be used, practically speaking, for an adult theater. Cl. test., June 23, 1982, at 87.

At page 17 of the Jurisdictional Statement, Appellants for the first time in this case suggest that the Metro sewage treatment plant and the Longacres race track and environs are not within the available land area. Appellants' belated attempt to pervert the record cannot be defended. The planning director testified that both facilities were within the available land area of Ordinance No. 3526. See footnotes 3 and 4. Also, Renton's objections to the Magistrate's report and Recommendation regarding Appellees' motion for a Preliminary Injunction (CR 143 at 16) extolls the fact that the area available to an adult theater includes the Longacres Race Track. Ordinance No. 3629's only effect on the available land area was to add to it by reducing the separation distance required from schools. Thus, all land "available" under Ordinance No. 3526 continued to be "available" under Ordinance No. 3629.

⁶ Cl. test., January 29, 1982, at 22 and 27-30.

⁷ Bond aff., June 15, 1982, at 5.

Appellants describe the legislative hearings as being the source of testimony about the impact of adult theaters on property values, crime, residential neighborhoods, and children. Appellants suggest they received and studied the documents underlying the Seattle ordinance as well as the approaches taken by numerous other cities within and without the State of Washington. The record below clearly fails to establish a long period of careful preenactment study. In fact, quite to the contrary, it affirmatively shows no such review at all. No written or legislative history exists from which it is possible to discern exactly what was considered by the Renton City Council in enacting Ordinance No. 3526.⁸ No expert evidence or factual evidence regarding the effects of adult entertainment uses on neighborhood or business districts was received.⁹ The City of Renton did not receive and study any material relative to the effects of adult businesses, and particularly adult theaters, upon the community.¹⁰ All of the material allegedly studied by Renton dealt with the *legality* of regulation rather than the underlying reasons and justifications for regulation.

The documents the planning director received "underlying" the Seattle ordinance were the decision in *Northend Cinema, Inc. v. City of Seattle*, 90 Wn.2d 709, 585 P.2d 1153 (1978), cert. denied, 441 U.S. 946 (1979), and a discussion of legal cases relative to the propriety of regulating adult businesses.¹¹ The testimony concerning crime being a secondary effect of a single adult theater came from an unidentified

⁸ Cl. dep., March 3, 1982, at 44.

⁹ Id. at 49; Cl. test., January 29, 1982, at 33.

¹⁰ Cl. dep., March 4, 1982, at 5-12.

¹¹ Id. at 11-12.

source, and no effort was made to verify this mere assertion.¹² No effort was made to contact the cities of Tacoma, Pasco or Bremerton, or other small cities within the State of Washington where adult theaters are located, to determine if such businesses presented any unique problem.¹³ Nothing in the legislative record indicates that empirical evidence from any source was received relative to the impact, if any, of adult businesses, let alone a single adult theater, on commercial property values.¹⁴ While Appellants assert here that there was testimony during the legislative hearings about the impact of adult theaters on neighborhoods and their effect on children, the record below undeniably establishes that the City was unable to identify what those impacts or effects would be.¹⁵ Finally, the review of "the approaches taken by numerous other cities, inside and outside the State of Washington," related solely to a review of ordinances and legal decisions, a "how to" review rather than a review and study of why it may be necessary to regulate and how to narrowly tailor a response to a particular problem.¹⁶ The record reflects that the planning director did not even review a substantial amount of the "how to" material available to him.¹⁷

¹² Id. at 14.

¹³ Id. at 15.

¹⁴ Id. at 17-18.

¹⁵ Id. at 42-44.

¹⁶ Id. at 5-12.

¹⁷ Id. at 9-10.

ARGUMENT

A. The Ninth Circuit's Ruling That Renton Could Not Rely Solely On The Experience Of Other Cities Is Justified By The Facts Of This Case.

Appellants allege that the Ninth Circuit erred in ruling that Renton could not rely upon the experiences of other cities in enacting its adult theater zoning ordinance.¹⁸ This incorrectly states the holding of the Court below. The Court, in fact, found that Renton *could* rely on such information; however, in the context of this case, those experiences were insufficient. *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527, 537 (9th Cir. 1984).

We do not say that Renton cannot use the experiences of other cities as part of the relevant evidence upon which to base its actions, but in this case those experiences simply are not sufficient to sustain Renton's burden of showing a significant governmental interest.

As noted above, the legislative record was devoid of any empirical evidence to support the regulations of the ordinance.¹⁹ Cases of this Court, where First Amendment concerns were involved, have required more than mere assertions and conclusions to support legislative burdens on First Amendment rights. They have required evidence that adult businesses pose problems more significant than those associated with various other permitted uses. *Shad v. Borough of Mt.*

¹⁸ Jurisdictional statement at 13.

¹⁹ See pages 3 and 4, *infra*.

Ephraim, 452 U.S. 61, 73 (1981). Justice Blackmun, in his concurring opinion in *Shad* pointed out that "the zoning authority must be prepared to articulate and support a reasoned and significant basis for its decision." *Shad*, at 77. The city must buttress its assertions with evidence that the state interest has a basis in fact and that factual basis was considered by the city in passing the ordinance. *Shad*, supra, (rejecting, for want of a factual basis, asserted reasons given in support of an ordinance that restricted First Amendment rights). Every circuit court that has considered the question has reached the same result.²⁰

These decisions and the decision of the Ninth Circuit are not in conflict with the decision in *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980). There, the Court's ruling was carefully limited to review of a single provision requiring 500 feet separation between adult uses. The proffered justification was to avoid the adverse secondary effects of concentration. (See footnote 31, infra). These means, to further an admittedly substantial governmental purpose, were approved in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Renton need not have conducted its own research into this area if the ordinance were designed to prevent the blighting effects of concentration.

The Ninth Circuit properly declined to follow the rule of *Genusa* upon which Appellants rely because Renton's ordinance is clearly unrelated to the effects of concentration inasmuch as clustering has not been

²⁰ *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1981); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982); *Fantasy Bookshop, Inc. v. City of Boston*, 652 F.2d 1115 (1st Cir. 1981); *Tovar v. Billmeyer*, 721 F.2d 1260 (9th Cir. 1983); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981); and *CLR Corp. v. Henline*, 702 F.2d 637 (6th Cir. 1983).

prohibited. Further, Renton has failed to articulate and substantiate another compelling governmental purpose or show that the least intrusive means have been used to accomplish that purpose.

No "factual evidence" of any sort was presented to the legislative body; rather, at best, it heard only unsubstantiated assertions and conclusions. Against this backdrop must be measured the substantiality of the evidentiary value of the experiences of those cities which were considered by Renton. The experience of other cities has no evidentiary value unless (1) those experiences have actually been considered and (2) those experiences are relevant to the problems facing the reviewing city. With respect to Detroit, it is clear that Renton only considered the decision of this Court²¹ and with respect to Seattle it only considered the decision of the Washington State Supreme Court and some associated legal briefing.²² None of the underlying studies, testimony, scientific data, or expert opinions were reviewed to determine if the situations experienced by those cities presented similar or different problems than those Renton felt were presented by adult businesses. In reality, Renton did not study or rely on the experiences of other cities, it relied on court decisions. Court decisions cannot supply the evidentiary bulwark necessary to support the substantial justification required as a predicate to intrusion into First Amendment freedoms.

The record is clear that neither the city council nor its planning department actually observed, studied, or found out anything about the effects of adult theaters or businesses. In fact, the planning director conceded

²¹ *Id.* at 8; Cl. test., January 29, 1982, at 37.

²² See footnote 11.

that the only significant operational characteristic distinguishing a general release theater from an adult theater was the image on the screen.²³ The only unique problems such a theater might pose operationally were traffic and signage, both of which could have been dealt with by less intrusive means.²⁴

As the Ninth Circuit pointed out, the means chosen by Renton to solve its alleged problems are different than those chosen by Seattle or Detroit, and much more intrusive on First Amendment activity. *Playtime Theatres, Inc.*, 748 F.2d at 536. It is not enough for a local government to articulate an interest, it must be prepared both to articulate and support a reasoned and significant basis for its zoning decision. *Shad*, 452 U.S. at 77 (Blackmun, J., concurring).

In summary, the Ninth Circuit Court of Appeals has not set arbitrary boundaries on the type of evidence a city council may consider. Rather, in accordance with the decisions of this Court, it has merely required that the evidence be factual, be actually considered, and be more than mere assertions. These minimum requirements are necessary because (paraphrasing this Court in *Shad*), it is not "self-evident" or "immediately apparent as a matter of experience" that a single adult theater presenting nonobscene movies would pose problems more significant than those associated with permitted uses, including a general release motion picture theater. 452 U.S. at 73-74.

²³ Cl. dep., March 4, 1982, at 21-22.

²⁴ *Id.*

B. Where Overly Restrictive Means Are Chosen To Implement A Zoning Scheme, Economically Unattractive Land Should Not Be Considered Constitutionally Available.

The Ninth Circuit's finding that the land set aside for the use of adult theaters in Renton is substantially unavailable is premised upon a two-prong analysis. The first part of that analysis involves the question of whether or not the land is viable. A theater must be located in a place where people are willing to go in the nighttime, that provides easy parking and is generally a focal point of nighttime recreation activity.²⁵ If no viable locations exist, the burden on protected expression is substantial and will not survive close scrutiny.²⁶ The other question which must be answered, if viable locations exist, is, "Are they in fact available?" If they are not available, or are not likely to become available, the burden on speech is as great as if the speech activity had been banned. The testimony offered by both parties below supports the finding of the Ninth Circuit on this issue that insufficient viable sites were available, thus creating a substantial burden on protected expression. With the exception of one site, which was probably not large enough, all of the allegedly set aside land was totally unsuited for use by a retail/recreation oriented business

²⁵ *Aff. Bond*, June 15, 1982, at 4.

²⁶ *Alexander v. City of Minneapolis*, 698 F.2d 936 (8th Cir., 1983); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir., 1982); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981); *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981); *Norton Street Book Shoppe, Inc. v. Village of Endicott*, 582 F. Supp. 1428 (N.D.N.Y. 1984)

such as a motion picture theater (whether adult or general release).²⁷ The planning director testified that an appropriate land use area for a motion picture theater would be in a neighborhood shopping center or in an area where more general business activity occurred.²⁸ He agreed that it would be inconsistent with good land use practices to place a motion picture theater in a heavy industrial area.²⁹ Finally, he readily acknowledged that a motion picture theater is a commercial oriented business that should locate with other commercial businesses of the same nature or intensity so that there is a compatibility of use, sharing of customers, trade and traffic.³⁰

It is clear from the record that none of the alleged land set aside meets these agreed criteria. Appellants simply misread and distort the holding below on this issue. No where did the Court require that property be immediately available for purchase. Rather, the Court ended its inquiry when it determined that the set aside land was not viable and therefore not available. The question presented by Appellants goes beyond the holding of the Ninth Circuit and asks this Court to decide an issue not considered by the lower court.

Given the record below, the proper focus of the inquiry should be whether a governmental entity may constitutionally relegate adult theaters to the most unattractive, undesirable, economically unviable areas of the city without articulating and substantiating a unique problem associated with such businesses which requires such drastic measures. The clear answer to this

²⁷ Aff. Bond, June 15, 1982, at 5.

²⁸ Cl. dep., March 4, 1982, at 19-20.

²⁹ Id. at 20.

³⁰ Id. at 20-21.

question by this Court and every other court that has dealt with the problem is that they may not. When a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial governmental interest. *Shad*, 452 U.S. at 68. A city may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976). *First National Bank of Boston v. Belotti*, 435 U.S. 765, 786 (1978). The fact that the market might be unrestrained does not give a local community carte blanche to regulate without concern for the First Amendment. *Shad*, supra. When a claim of suppression of speech is raised, "(t)he inquiry for First Amendment purposes is not concerned with economic impact; rather it looks only to the effect of this ordinance upon freedom of expression." *Young*, 427 U.S. at 78, (Powell, J., concurring). Courts must be alert to the possibility of cities using the zoning power as a pretext for suppressing expression. Id. at 84. The record below does not support a conclusion that unusual problems, unique to adult theaters, require their removal from commercial areas to remote, isolated, industrial areas.³¹

Viewing Renton's ordinance in light of its impact on free speech, it is clear that it drastically impairs the

³¹ In his concurrence in *Young*, Justice Powell observed that "(m)ost of the ill effects (from adult establishments) . . . appear to result from clustering itself rather than the operational characteristics of individual theaters." 427 U.S. at 82, n.5.

availability in Renton of nonobscene films for adult viewing.³² Renton has asserted no substantial basis in fact for such a restriction nor has Renton investigated or experimented with less intrusive means for accomplishing as yet undelineated and undefined governmental goals.

Small communities can legitimately zone to deal with real problems associated with adult businesses. However, they may not zone in a manner which substantially burdens free expression. Appellants seek the right for small communities to act as censors of non-obscene speech, a right hitherto denied to all, large or small.

C. Deference To Legislative Fact Finding, In The Face Of Objective Evidence Within The Legislative Record Of A Motivation To Suppress Protected Speech, Would Be Chaotic To Settled Principles Of First Amendment Law.

Appellants misstate the holding of the Ninth Circuit Court of Appeals by suggesting that the Court ruled that vocal citizen distaste for free expression is sufficient to establish an improper governmental motive, assuming adequate proper evidence exists within the legislative record to support a compelling governmental interest.

The Ninth Circuit has made it clear that in making a determination of legislative motive, only the objective legislative history may be employed. The subjective

reasons of legislators may not be questioned. *City of Las Vegas v. Foley*, 747 F.2d 1294 (9th Cir. 1984). In the case at bar, no factual evidence appears in the legislative history to justify the ordinance's restrictions. Citizen comment, when it constitutes the entire objective legislative record, may be and should be considered in assessing the legislative body's motivations.

The Ninth Circuit holding that "where mixed motives are apparent," the Court is required to determine whether "a motivating factor in the zoning decision was to restrict plaintiff's exercise of First Amendment rights" is a correct statement of the law as promulgated by this Court. The test enunciated in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), requires that the assertion of the governmental interest must be unrelated to the suppression of free expression. Consideration of this part of the test necessarily involves a determination of the motives of the legislative body because purposeful governmental suppression of free expression is unconstitutional. *Central Hudson Gas v. Public Serv. Comm.*, 447 U.S. 557 (1980). Where evidence exists in the objective legislative history that suggests that suppression of free expression was a motivating factor, strict scrutiny of such an ordinance is required, both as to its ends and the means used to achieve those ends and judicial deference is no longer justified. *Arlington Heights v. Metropolitan*

³² See e.g., *Basiardanes v. City of Galveston*, 682 F.2d at 1214; *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D.Ga. 1981)

Housing Development Corp., 429 U.S. 252, 265-266 (1977).³³ Determining whether suppression was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.

The chronology and facts surrounding legislation may, indeed, suggest that a city has embarked on an effort to suppress free expression. *Young*, 427 U.S. at 80 (Powell, Jr., concurring). The record below is replete with objective signs that these ordinances were intimately related to a governmental intent to suppress free expression. Both the magistrate and the district court recognized that many of the stated reasons for the ordinance were no more than expressions of dislike for the subject matter. *Playtime Theatres, Inc.*, 748 F.2d at 537. The mile separation from schools required by Ordinance No. 3526 was patently unreasonable and unconstitutional, and could only suggest an intent to suppress. The entire legislative process was commenced as a result of a communication from the mayor suggesting legislation to "respond to the public outcry" about adult businesses by designating "nonacceptable enterprises/localities."³⁴ Finally, counsel for Appellants

³³ At page 24 of the Jurisdictional Statement, Appellants incorrectly state the holding in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Rather than holding that improperly motivated citizen comment did not invalidate the ordinance, the Court held: "respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." 429 U.S. at 270. Appellants' statement also misstates the holding of the district court which held that evidence of improperly motivated citizen comment "does not warrant the conclusion that this motivated the defendants." 373 F.Supp. at 211.

³⁴ May 22, 1980 memorandum, Shinpoch to Trimm, Exhibit 6.

conceded at oral argument to the Ninth Circuit that Ordinance No. 3629 was passed, at least in part, to "create" a legislative history to support Ordinance No. 3526. Fabricating governmental reasons as a post hoc justification for prior legislation certainly suggests, if not compels, the conclusion that the initial legislation was passed for an improper motive or without adequate justification.

Given the record below, the Ninth Circuit said:

Neither the facts before the Renton City Council nor those presented to the District Court appear to justify the ordinance's restriction on protected expression. Renton has not shown that it was not motivated by a desire to suppress speech based upon its content. Given the inferences raised in the record below us, we remand for reconsideration, particularly in light of *Tovar*.

748 F.2d at 537.

What the Appellants invite is a rule that ignores the intent of the legislative body and allows judicial review of one question only; i.e., whether the subject matter of the regulation is within the legislative power of the governmental body. In the area of expression protected by the First Amendment, strict judicial scrutiny of both means and ends has always been required by this Court. *Young*, 427 U.S. at 56: n. 12; *Interstate Circuit, Inc. v. Dallas*, 396 U.S. 671 (1968). Deference to legislative fact finding is not allowed. To rule otherwise would require this Court to overrule scores of cases which have oft repeated and endorsed these rules.

SUMMARY

The opinion of the Ninth Circuit Court of Appeals is consistent with the relevant decisions of this Court and federal courts throughout the country. Appellants have erroneously characterized the issues and their importance by misstating essential facts and attempting to recast essentially factual disputes into legal issues that go far beyond the holdings of the Ninth Circuit.

Appellees respectfully submit that neither Appellants' jurisdictional statement nor the opinion of the Court of Appeals for the Ninth Circuit raise substantial federal questions. Affirmance of the opinion below will not leave city governments and city planners without hope in finding reasonable approaches to the secondary effects, if any, of adult establishments. Rather, it will direct and guide those governments and planners to follow the mandates of this Court in order to achieve "innovative land use regulation." *Young*, 427 U.S. at 73 (Powell, J., concurring).

If cities are able to adequately identify and document a secondary effect upon their community of a particular land use which creates a substantial governmental interest in dealing with that problem, even if that land use be one that involves freedom of expression, the decisions of this Court do, and will continue to, allow narrowly drawn laws designed to serve those interests. The decision of the Ninth Circuit Court of Appeals does nothing to circumscribe this right.

CONCLUSION

For all of the above reasons, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,
Jack R. Burns,
Counsel for Appellees

No. 84-1360

Office - Supreme Court, U.S.
FILED

MAR 28 1985

ALEXANDER L. STEVENS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

THE CITY OF RENTON, *et al.*,
v. *Appellants,*

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF

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IN THE
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**On Appeal from the United States Court of Appeals
for the Ninth Circuit**

REPLY BRIEF

1. *The Facts.*

In their Motion to Affirm, Appellees (hereinafter "Playtime") have adopted and compounded the error of the Ninth Circuit by relying upon maps and testimony which were submitted at an early TRO hearing and which, as pointed out in our Jurisdictional Statement (p. 17), were in error because of the necessity for preparing them so quickly. At no time, for example, have the race track or sewage treatment plant been located within the area where adult theatres can locate (the "set-aside zone").¹ At no time has the set-aside zone been "less

¹ Playtime states (p. 2 n. 5) that in Renton's objections to the Magistrate's report and recommendation, the City extolled the fact that its set-aside zone included Longacres Racetrack. This is simply not true. What Renton's counsel stated was that "The area

than 200 acres".² At no time has most of the set-aside zone been unavailable for commercial development.³

The important points which Playtime attempts to obscure are that (1) Renton's set-aside zone for the location of adult theatres is presently made up of 520 acres (a fact that Playtime does not dispute); (2) witnesses for *both* parties acknowledged that many commercial

available for an adult theater or its environs already includes Longacres Race Track, which is one of the major adult entertainment areas in the State of Washington. * * * This location is primarily served by the same roadways and is located in the same area as the Magistrate has termed inaccessible, unattractive and inconvenient." CR 143 at 16 (emphasis added). The point counsel was making was that the set-aside zone bordered the racetrack and was served by the same roadways.

² Playtime states (pp. 1-2) that as a practical matter, the land actually "available" was less than 200 acres. The testimony cited by Playtime (p. 2 n. 5) shows that "availability" was being used by the witness in one of two ways: to determine whether a particular piece of property was *outside* the set-aside zone, or to determine that a specific land area *inside* the set-aside zone was presently being used for other purposes. The first inquiry is irrelevant, so long as the remaining area is large enough to give free expression to adult theatres' rights, and the second poses one of the very issues in the case—must premises be presently "on the market" in a kind of turnkey operation in order to meet the constitutional requirement of availability?

³ Playtime alleges (p. 2) that most of the available land within the original 400 acres was "within a flood plain". A flood plain, however, is not an uninhabitable area but only one in which a potential flood hazard exists. The boundaries of the flood plain extend to all areas potentially affected by a flood, which would occur statistically but once every 100 years. The record shows that within the flood plain, which is larger than the set-aside zone, "there are extensive commercial developments" and "a variety of industrial and commercial activities ranging in size from relatively small to up to 200,000 square feet of gross floor area." Cl. test., Jan. 29, 1982, at 40-41. The flood plain even includes the Longacres Racetrack. *Id.* These facts refute any notion that this area of the City may not be fully compatible with commercial use.

ventures are operating there, and (3) the area is easily accessible and is criss-crossed by major traffic arteries.⁴

Playtime is correct in one respect: the introduction to Renton's "Questions Presented" (Juris. State. at i) implied that the entire 520 acres were set aside for adult theatres *before* any adult theatre came to Renton. As the body of the Jurisdictional Statement made clear, prior to the entry of any adult theatre, the set-aside zone was about 400 acres in size—an area, incidentally, which would have accommodated some 335 adult theatres and surrounding parking spaces.⁵ After Playtime entered Renton, the restriction on adult theatres' proximity to schools was reduced from one mile to 1,000 feet. The effect was to increase the set-aside zone from 400 to 520 acres. The important point, therefore, is that Renton acted in good faith prior to the attempted entry of any adult theatre, and that at all times the set-aside zone has been more than ample to accommodate all of the adult theatres that could possibly wish to locate within the City.

Playtime argues (pp. 3-4) that the Renton City Council studied only court rulings and not the experiences themselves in other cities. Playtime's argument is both irrelevant and wrong on the facts. Whether the City Council studied legal decisions or the facts underlying those decisions is surely without constitutional significance in determining whether the Council properly carried out its legislative function of determining the proper solution to the problems threatening its citizens and

⁴ See Juris. State. at 8-9.

⁵ This figure is reached by using the same calculations which are set forth in our Jurisdictional Statement (p. 18 n. 38) and which Playtime does *not* dispute. Even under Playtime's mischaracterization of the facts, the smallest amount of land available in this case would constitute a larger percentage of the total land in Renton than was available for adult theatres in Seattle.

neighborhoods.⁶ But the fact is that much more was studied than legal decisions.⁷

Playtime also argues (p. 3) that there was no "long period of careful preenactment study" by the City Council, and "[n]o written or legislative history exists" of its meetings.⁸ Surely almost a year of study, meetings, testimony, documents and the like is enough,⁹ and there was ample evidence as to what occurred at its meetings.¹⁰

⁶ The judicial decisions studied by Renton *recited* the experience in each of the cities to which the decisions related. *E.g.*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 52-57, 71, 74-75, 81-82 (1976); *Northend Cinema, Inc. v. City of Seattle*, 90 Wash.2d 709, 585 P.2d 1153, 1154-55 (1978), *cert. denied*, 441 U.S. 946 (1979). As noted *infra*, what Playtime apparently seeks is to have each city which is in the process of enacting a zoning ordinance go back and review all of the evidence underlying the experiences upon which the city is relying, even though the legal decisions set forth what those experiences were, and then apply that evidence to *existing* problems with adult uses in the city proposing the legislation.

⁷ For example, Playtime states (p. 3) that as to Seattle, Renton reviewed only the Washington Supreme Court's ruling in *Northend Cinema* and a report which discussed "legal cases * * * relative to the propriety of regulating adult business." What Playtime fails to note is that this same report, written by the Assistant Corporation Counsel of Seattle, included "a summary of the Seattle experience." Cl. dep., March 4, 1984, at 11-12.

Moreover, in addition to the many documents reviewed (see *Juris. State.* at 5), Renton received advice from its own Acting Planning Director, who had had experience with adult uses in another State. See *Juris. State.* at 6 n. 11.

⁸ Renton's counsel did indeed state, as Playtime notes (pp. 14-15), at oral argument to the Ninth Circuit that Renton's second ordinance was passed at least in part to set forth the legislative history which underlay the enactment of the first ordinance. But this was not for the purpose of "[f]abricating governmental reasons as a post-hoc justification for prior legislation", as Playtime charges (*id.*). The legislative history in the second ordinance was merely a memorialization of what had already occurred.

⁹ See *Juris. State.* at 5-6.

¹⁰ The District Court based its findings on substantial evidence as to what had occurred at the various City Council and committee hearings. See footnote citations in *Juris. State.* at 5-6.

2. Experiences of Other Cities.

Playtime seems to argue (pp. 5-8) that Renton did not really consider the experiences of other cities, and in any event it did not study enough of the facts underlying those experiences. We have already answered these points; the record is replete with evidence that Renton, over a period of almost a year, studied the experience of many cities, inside and outside the State of Washington. We respectfully submit that it is not the function of a court to pass judgment on whether a City Council heard "only unsubstantiated assertions and conclusions", as Playtime asserts (p. 7), or whether it considered solid evidence. The fact is that the City Council heard more than enough to reach the conclusion that it had better deal in a responsible manner with the potential threat of deterioration in its neighborhoods.

Playtime's treatment of *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), is puzzling. Playtime first argues (p. 6) that the decision below and *Genusa* are not in conflict, and then states (*id.*) that the Ninth Circuit "declined to follow the rule of *Genusa*". The reason for the failure to follow the *Genusa* rule, according to Playtime (pp. 6-7), is that Renton's ordinance must have been unrelated to the effects of "concentration", since "clustering" is not prohibited. But Renton was not just concerned with the effects of one or more adult theatres; it was concerned with *where* those effects would take place. It wanted the effects to manifest themselves away from schools, churches, residences and public parks, but in other accessible areas. As this Court and the Washington Supreme Court have pointed out, the choice of methods for dealing with the adult theatre problem—whether by concentration or dispersal—is constitutionally irrelevant.¹¹

Genusa's importance lies not in whether it was a concentration or dispersal case, but rather in the fact that

¹¹ *Young*, 427 U.S. at 62-63; *Northend Cinema*, 585 P.2d at 1159.

the Seventh Circuit held to the common-sense view, adopted by the District Court below (App. 30a) but rejected by the Ninth Circuit (App. 17a, 19a), that "[a] legislative body is entitled to rely on the experience and findings of other legislative bodies as a basis for action." 619 F.2d at 1211.¹²

Playtime virtually concedes that under its theory a city cannot enact an adult-use zoning ordinance in advance of the entry of adult theatres. Thus, it argues (p. 16) that adult-use ordinances are valid only if "the cities are able to adequately *identify* and *document* a secondary affect upon their community of a particular land use which creates a substantial governmental interest in dealing with that problem * * *" (emphasis added). It would be impossible to meet this test until and unless adult theatres had gained entry and caused the secondary affects.

Finally, it is important to note that the Ninth Circuit's ruling in regard to the impermissibility of reliance by cities on the experience of others is already being expanded to areas far removed from adult uses. Thus, in *Preferred Communications, Inc. v. City of Los Angeles*, No. 84-5541 (9th Cir. Mar. 1, 1985), the Ninth Circuit held that a city may not, under the First Amendment, prohibit a cable television operator from having access to public utility facilities. The court cited the instant case, in part, for the proposition that a city must justify its regulations in terms of its own problems and "may not rely on the problems faced by other communities * * *." *Id.*, slip op. at 16-17, 24, incl. n.9. Thus,

¹² The Ninth Circuit's statement (App. 19a) that "[w]e do not say that Renton cannot use the experiences of other cities as part of the relevant evidence upon which to base its actions" goes for nothing, because that court would require an experience and an ordinance exactly like those of Renton. There would never be such a duplication. Even more to the point, how could Renton duplicate an experience it had not yet had?

there is an urgent need for this Court to clarify the extent to which a city must replicate the experience of others before it can enact legislation.

3. *The "Availability" of the Land.*

Playtime argues (p. 10) that the Court of Appeals did not require property in the set-aside zone to be "immediately available for purchase". The fact is that the Court of Appeals held the set-aside zone to be improper in part because it was *already* occupied by a business park, warehouse and manufacturing facilities, and "a fully-developed shopping center". App. 13a-14a. The only way such a conclusion could have relevance would be if existing uses made the property constitutionally "unavailable".¹³

Playtime wants to have it both ways: if the property is presently undeveloped, Playtime claims the property is constitutionally "unavailable"; if the property is presently developed, Playtime claims the property is likewise constitutionally "unavailable". The only option in its view is that the City undertake the burden of providing an immediately occupiable building to suit its needs—something the Constitution does not require.

Playtime also uses (pp. 10-11) such words as "unattractive", "undesireable", "economically unviable", "remote" and "isolated" to describe the set-aside zone. Aside from the fact that these descriptions are not supported by the record,¹⁴ Playtime nowhere explains why such facilities as "a fully-developed shopping center" would already have located in such an area.

Make no mistake: what Playtime and other adult theatre owners are seeking, as a matter of constitutional

¹³ Of course, even if that were the proper rule—which it clearly is not—it would ignore the fact that much of the land in the set-aside zone is unoccupied. See *Juris. State.* at 18-19, incl. n. 41.

¹⁴ The District Court's findings wholly refute them. App. 27a-28a.

right, is to gain preferential access to the best sites, located in downtown, congested areas, without regard to the degrading effect upon the character of the surrounding neighborhood. This was made clear by one of Playtime's witnesses, who stated that "in the exhibition business you must rely on movie posters, you must rely on marquees or walk-by and drive-in traffic in addition to your advertising. That's a very important part of advertising. And out there [in the Renton set-aside zone] you just don't have it."¹⁵ In other words, these adult theatre owners are seeking not just land located near urban and commercial areas, and easy access through boulevards and streets, but locations in the middle of the most congested areas so they can entice customers off the streets with their advertising. They are seeking not just availability, to which they are constitutionally entitled, but guaranteed business, to which they are not.

As the District Court found (App. 26a-28a), Renton's set-aside zone is large, accessible, and in all stages of development. If this zone will not stand constitutional muster, *Young* is a dead letter, and communities are powerless to experiment in this important area of land use planning.¹⁶

¹⁵ John. test., June 23, 1982, at 30. This same approach was confirmed by another of Playtime's witnesses, who said that "[a] theatre must be located in a people-oriented environment that has regular nighttime traffic and complimentary businesses such as fast-food outlets and restaurants." A theatre, he said, must be "generally a focal point of nighttime recreation activity." Bond aff., June 15, 1982, at 4.

However, the fact that an adult theatre does not have to be centrally located in order to attract customers was demonstrated conclusively by Playtime's own President, who testified that patrons drive from 20 to 30 minutes from Vancouver, B.C., to Playtime's theatre in Point Roberts, Washington (population 250), to view adult films. Forbes dep., May 27, 1982, at 27.

¹⁶ Twice in this section of its Motion to Affirm, Playtime describes its film fare as "nonobscene" (p. 12). While it is hardly determinative of the issues in this case, we call the Court's attention

4. Legislative Intent.

Playtime's discussion of a court's role in regard to legislative fact-finding demonstrates why a review of the instant case by this Court is imperative. Playtime begins its discussion by stating (p. 12) that in making a determination of legislative motive, only the objective legislative history may be employed. However, Playtime then says (p. 13) that where "mixed motives" are apparent, a court must determine whether "a" motivating factor was to restrict the exercise of First Amendment rights. This test, it says (pp. 13, 14), "necessarily involves a determination of the motives of the legislative body" and "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available". Without arguing again what the proper rule should be,¹⁷ we merely point out that the tests proposed by Playtime clearly do not follow from this Court's opinions and appear to be wholly unworkable. A court should not be second-guessing a city council in the performance of its legislative functions, trying to determine "mixed motives" and engaging in a "sensitive inquiry" into the issue of intent. This Court has repeatedly pointed out that "inquiry into legislative motive is often an unsatisfactory venture"¹⁸ and has repeatedly declined to engage in such a venture even when the legislative motive was suspect.¹⁹

to the fact that a state court has held some of Playtime's films in Renton to be obscene. *City of Renton v. Playtime Theatres, Inc.*, No. 82-2-02344-2, slip op. at 23-29, 39 (King County, Wash. Sup. Ct., Mar. 9, 1984).

¹⁷ See *Juris. State.* at 21-24.

¹⁸ *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983).

¹⁹ *E.g.*, *Pacific Gas & Elec. Co.*, 461 U.S. at 215-216; *Michael M. v. Superior Court*, 450 U.S. 464, 469-470 (1981) (plurality opinion); *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968); *Palmer v. Thompson*, 403 U.S. 217, 224 (1971).

In any event, the point here is that if what Playtime argues and the Ninth Circuit has adopted is to be the test, this Court should say so, because such a ruling will affect local legislatures and lower courts for the indefinite future.

CONCLUSION

As evidenced by the strong *amicus* support from mayors, cities, counties and state governments from across the country, the issues in this case are of extraordinary importance. Local governments have attempted in various ways with various ordinances to deal with the deterioration of neighborhoods as a result of adult uses. These efforts have been almost universally frustrated by the lower courts, despite this Court's decision in *Young*. If the good-faith attempt by Renton will not stand, cities are helpless to experiment in this area of growing local and regional concern. This Court should note probable jurisdiction and reverse the decision below.

Respectfully submitted,

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JOINT APPENDIX

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APPEAL DOCKETED FEBRUARY 26, 1985
PROBABLE JURISDICTION NOTED APRIL 15, 1985

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JOINT APPENDIX *

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. 82-0059M

THE CITY OF RENTON, *et al.*,

v.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,

DOCKET ENTRIES

| DATE | NR. | PROCEEDINGS |
|--------|-----|--|
| 1982 | | |
| Jan 20 | 1 | COMPLAINT—for declaratory judgment and preliminary injunction s/c issued. |
| Jan 20 | 2 | MOTION—for preliminary injunction with oral argument requested. |
| Jan 20 | 3 | MOTION—for leave to file a brief of twenty pages. Brief is memorandum in support of motion for preliminary injunction. |
| Jan 20 | — | RECEIVED and LODGED—Pltf's Memorandum in Support of Motion for preliminary injunction. Lodged pending outcome on motion for leave to file. |
| Jan 20 | — | RECEIVED and LODGED—Order to Show Cause why preliminary injunction should not issue. |
| Jan 22 | 4 | ORDER OF REFERENCE—to Magistrate Sweigert for handling of dispositive motions. cc: Counsel and Magistrate. |

| DATE | NR. | PROCEEDINGS |
|--------|-----|---|
| 1982 | | |
| Jan 22 | — | LODGED and RECEIVED—Order (for leave to file excess brief). |
| Jan 22 | 5 | MOTION—for temporary restraining order. (To Mag. Sweigert). |
| Jan 22 | 6 | ORDER—Pltfs request to file brief of twenty pages is GRANTED. cc: Counsel. |
| Jan 25 | 7 | PLTF'S MEMORANDUM—in support of Motion for Preliminary Injunction. (Over-sized filed by leave of Court on 1/22/82.) |
| Jan 25 | 8 | ORDER—to show cause why temporary restraining order should not issue (set for 1:30 pm Friday 1/29/82 before Sweigert). cc: Counsel. |
| Jan 25 | 9 | APPLICATION—for permission to participate by Robert Eugene Smith on behalf of Pltf. as co-counsel to Jack Burns. |
| Jan 25 | 10 | ORDER—GRANTING R.E. Smith permission to participate for PLTF. cc: Counsel. |
| Jan 25 | 11 | AFFIDAVIT OF SERVICE—of (1) summons and complaint; (2) Pltf's memo in support of motion for Prelim. Injunct.; (3) motion for prelim. injunct.; (4) motion for leave to file 20 page brief; (5) motion for prelim. injunct. (oral requested); proposed order to show cause all served on City of Renton (Delores H. Mead, City Clerk) and Jim Bourasa, Acting Chief of Police. Service on 1/21/82. |
| Jan 27 | 12 | AFFIDAVIT OF SERVICE—of (1) summons and complaint; (2) PLTF's memo in support of motion of Preliminary injunction; (3) Motion for leave to file brief of 20 pages; (4) Motion for preliminary in- |

| DATE | NR. | PROCEEDINGS |
|--------|-----|--|
| 1982 | | |
| | | junction (oral argument requested); (5) order to show cause served on Mayor Barbara Y. Shinpoch on 1/22/82. |
| Jan 27 | 13 | NOTICE OF APPEARANCE—by Lawrence J. Warren and Daniel Kellogg for all defts. |
| Jan 27 | 14 | DEFTS MEMORANDUM—in opposition to Motion for Temporary Restraining Order and Preliminary Injunction. |
| Jan 27 | 15 | AFFIDAVIT—of Gary F. Kohlwes, Superintendent of Renton School District and Secretary of Renton School Board support of Deft's opposition to Motions. |
| Jan 27 | 16 | AFFIDAVIT—of David R. Clemens, Policy Development Director of City of Renton in support of Deft's opposition to Motions. |
| Jan 28 | 17 | AFFIDAVIT—in support of Pltf's motions for TRO and Preliminary injunction (affidavit by Jack R. Burns). |
| Jan 28 | 18 | PLTF'S REPLY—to Deft's memorandum in opposition to motion for TRO and Preliminary Injunction. |
| Jan 29 | 19 | PRAECIPE—issue one civil subpoena for hearing on 1/29/82 at 1:30pm. Issued db. |
| Jan 29 | 20 | OBJECTION—to and motion to strike portions of Affidavits of Jack R. Burns dated January 21, and January —, 1982 submitted by Defts. |
| Jan 29 | — | RECEIVED and LODGED—Order denying motion for TRO submitted by Defts. |
| Jan 29 | 21 | RETURN ON SERVICE—for service of subpoena on David R. Clemens served 1/29/82 at 10:45 am for hearing on 1/29/82 at 1:30 pm. |

| DATE | NR. | PROCEEDINGS |
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| 1982 | | |
| Jan 29 | — | Hearing on Motion for TRO, reporter Susan Palmerton—Magistrate advised counsel that he will recommend to Judge McGovern that no TRO be entered. Mag's R&R will be filed 2/1/82. Counsel will have 10 days to file objections. Hearing on preliminary injunction issues to be set later. Exhibits 1-5 admitted. |
| Feb 3 | 22 | REPORT AND RECOMMENDATION—of Sweigert. |
| Feb 3 | — | RECEIVED and LODGED—Order to be presented to Judge McGovern for signature NLT 2/16/82 if no objections are filed by 2/15/82. Order contains (1) R&R approval; (2) Pltf's motion for TRO denied; and distribution instructions. |
| Feb 9 | 23 | AMENDED AND SUPPLEMENTAL COMPLAINT—for declaratory judgment and preliminary and permanent injunction. |
| Feb 10 | 24 | TESTIMONY—of David R. Clemens on 1/29/82 before the Magistrate at hearing on Pltf's motion for TRO. (Original to Magistrate, copy in court file.) |
| Feb 12 | 25 | OBJECTIONS—to Magistrate's report and recommendation filed by Pltf. |
| Feb 18 | — | LETTER—from Pltf's counsel to Deft. Counsel confirming hearing on Pltf's motion for a preliminary injunction set for 3/19/82 before Magistrate Sweigert. |
| Feb 18 | 26 | NOTICE OF MOTION—Pltf's Objections to the Report and Recommendation of Magistrate will be set for 3/5/82. |

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| 1982 | | |
| Feb 18 | 27 | CERTIFICATE OF SERVICE—of Notice of Motion mailed to Deft. counsel on 2/17/82. |
| Feb 19 | 28 | NOTICE OF DEPOSITION—of David Clemens on 3/3/82 and City of Renton on 3/3-4/82 at the request of Pltf. |
| Feb 22 | 29 | MOTION—(by Deft) to dismiss complaint pursuant to FRCP § 12(b)(1) and § 12(b)(6)—court lacks jurisdiction and Pltfs have failed to state a claim upon which relief can be based. |
| Feb 22 | 30 | MEMORANDUM—of points and authorities in support of Deft's Motion to dismiss. |
| Feb 22 | 31 | NOTICE—of Motion to dismiss. (Requested by separate motion that motion to dismiss be before Judge McGovern) set for 3/12/82. |
| Feb 22 | 32 | DEFTs' MOTION—for hearing of Motion to Dismiss complaint before District Court Judge. |
| Feb 22 | 33 | NOTICE OF MOTION—for hearing motion to dismiss before District Court Judge set for 3/12/82. |
| Feb 22 | — | LODGED—Order to Hearin Motion to Dismiss Complaint Before District Court Judge. |
| Feb 22 | 34 | APPLICATION—for permission to participate by James J. Clancy in association with Warren & Kellogg, P.S. as attorney of record for Defts. |
| Feb 22 | 35 | NOTICE—of application for permission to participate set for 3/12/82. |

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| Feb 22 | — | LODGED—Order Granting Leave to Participate to Mr. Clancy. |
| Feb 22 | 36 | DESIGNATION—of person to testify at deposition—David R. Clemens will testify for City of Renton on 3/3-4/82. |
| Feb 22 | 37 | CERTIFICATE OF SERVICE—of the preceding 10 docket items on Jack Burns on 2/22/82 by mail. |
| Feb 24 | — | ENT ORDER—(1) Defts' motion for hearing motion to dismiss before District Court Judge is DENIED. (2) Deft's motion to dismiss the complaint is hereby referred to Magistrate Sweigert for consideration. Counsel advised by mail. |
| Feb 24 | 38 | ORDER—granting leave to participate to James J. Clancy on behalf of Defts. Counsel advised. |
| Feb 23 | 39 | ORDER—(1) R&R approved and adopted; (2) Pltf's motion for TRO DENIED; and, (3) copies to all counsel and magistrate. |
| Feb 23 | 40 | JUDGMENT—on Order referenced above. cc: Counsel and Magistrate. |
| Mar 1 | 41 | AFFIDAVIT OF SERVICE—of deposition subpoena on David R. Clemens on 2/25/82. |
| Mar 2 | 42 | LETTER—from Magistrate's office to counsel indicating oral argument will be heard on Deft's Motion to Dismiss on 3/12/82 before Magistrate Sweigert at 9:30 am. |
| Mar 2 | 43 | ORDER—continuing Preliminary Injunction Hearing set for 3/19/82 until further notice. cc: Counsel. |

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| 1982 | | |
| Mar 2 | 44 | OBJECTION—to inspection or copying pursuant to Subpoena Duces Tecum for David R. Clemens submitted by Defts. Certain material requested should be privilege as "Attorney-Client" re 'comprehensive report from the City Attorneys'. |
| Mar 2 | 45 | CERTIFICATE OF MAILING—on 3/2/82 to Jack Burns of the noted objection. |
| Mar 8 | 46 | MOTION—for leave to file a brief in excess of 20 pages. Complex issues are involved and the support memo was in excess of 20. |
| Mar 8 | — | LODGED—Order allowing Pltf filing of excessively long brief. |
| Mar 8 | — | LODGED—PLTFS MEMORANDUM—in opposition to Defts' motion to dismiss. |
| Mar 8 | 47 | ORDER—granting leave to file a brief in excess of 20 pages. cc: Counsel. |
| Mar 8 | 48 | PLTF'S MEMORANDUM—in opposition to Deft's Motion to dismiss. |
| Mar 11 | 49 | REPLY MEMORANDUM—defts in support of defts motion to dismiss. |
| Mar 11 | 50 | CERTIFICATE—of mailing. |
| *Mar 10 | — | ENT ORDER—consolidating C82-263M (originally assigned to Rothstein) with this case, all originals to be filed in C82-59M. |
| Mar 12 | — | HEARING—on Oral argument on Deft's motion to dismiss. Motion Denied. Magistrate to prepare R&R for McGovern. Margaret Walkky. |

| DATE | NR. | PROCEEDINGS |
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| 1982 | | |
| Mar 11 | 51 | NOTICE—of Deposition of Roger H. Forbes on 3/19/82 by Deft. City of Renton. |
| Mar 12 | 52 | OBJECTION TO REMOVAL AND MOTION—to Remand to State Court and for costs filed by Deft City of Renton. |
| Mar 12 | 53 | MEMORANDUM—in support of Motion to remand to state court filed by Deft. City of Renton. |
| Mar 12 | 54 | NOTICE—of motion to remand to state court to be heard by Magistrate Sweigert on 4/2/82. |
| Mar 15 | 55 | ORDER OF REFERENCE—referring to Magistrate Motion on Remand. cc: Counsel. |
| *Mar 13 | — | LETTER—from Pltf. counsel (Smith) to Magistrate requesting the court consider recent decision from similar issued in the District of Minnesota as part of Deft brief in opposition to Defts Motion to dismiss. |
| Mar 15 | 56 | CERTIFICATE OF MAILING of copy of subpoena duces tecum to Jack Burnson on 3/12/82 by mail. |
| Mar 17 | 57 | COPY OF LETTER to Mag. indicating hearing Motion For Remand will be heard on 4/9/82. |
| Mar 18 | 58 | AFFIDAVIT OF SERVICE of Deposition subpoena on Roger H. Forbes for deposition on 3/19/82 at the request of Defts. |
| Mar 19 | 59 | PLTF'S MOTION to dismiss Complaint in C82-263M (Where this Pltf is the deft.—More specifically the Playtime Theaters |

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| 1982 | | |
| | | are requesting dismissal of Complaint filed by City of Renton). |
| Mar 19 | 60 | NOTICE of Motion set for 4/9/82 before McGovern. |
| Mar 19 | 61 | CERTIFICATE OF SERVICE of Notice of Motion and Motion to dismiss on Mr. Kellogg by mail on 3/18/82. |
| Mar 22 | 62 | TRANSCRIPT of hearing on Deft's Motion to dismiss complaint in No. C82-59M held on 3/12/82 before Magistrate Sweigert. |
| Mar 24 | 63 | ORDER OF REFERENCE of all pretrial issues and matters to Mag. Sweigert. All dates set before McGovern are suspended and to be reset by Magistrate. Copies to Cnsl & Mag. |
| *Mar 19 | 64 | MEMORANDUM in support of Defts' (Playtime Theatres) Motion to dismiss Plaintiffs' (City of Renton) Complaint (in C82-263M) for declaratory Judgment. |
| Mar 25 | 65 | COPY OF LETTER, Counsel indicating City of Renton's Motion to Dismiss will be heard with the Motion to remand on 4/9/82. |
| Mar 25 | 66 | REPORT & RECOMMENDATION on Defendants (City of Renton) Motion to Dismiss. |
| Mar 25 | — | LODGED—Order. To be submitted to McGovern on 4/8/82 if no objections are noted. (Denying Motion to Dismiss). |
| Mar 30 | 67 | DEPOSITION of David R. Clemens, Volume I, taken on 3/3/82 at the request of Pltf (Playtime Theatres). |

| DATE | NR. | PROCEEDINGS |
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| 1982 | | |
| Mar 30 | 68 | DEPOSITION of David R. Clemens, Volume II, taken on 3/4/82 at the request of Pltf (Playtime Theatres). |
| Apr 1 | 69 | MEMORANDUM of Playtime Theatres Inc. and Kukio Bay Properties inc. in opposition to the City of Renton's motion to remand. |
| Apr 1 | 70 | CERTIFICATE OF SERVICE of memorandum on Deft. counsel by mail. |
| Apr 6 | 71 | BRIEF in opposition to Playtime's motion to dismiss City of Renton Complaint for declaratory judgment and in reply to Playtime memorandum in opposition to remand. |
| Apr 7 | 72 | OBJECTIONS TO Magistrate's R&R on Defts' motion to dismiss from Deft's counsel. |
| Apr 7 | 73 | NOTICE OF MOTION noting Defts' objections for 4/23/82 before Judge McGovern. |
| Apr 7 | 74 | CERTIFICATE OF SERVICE of Objections and Notice to Pltf's cnsl by mail on 4/7/82. |
| Apr 9 | 75 | ANSWER to Subpoena Duces Tecum filed by Pltf. |
| Apr 9 | — | HEARING Oral Argument on Motion to Remand. Court will recommend to Judge McGovern that Pltf's motion to remand to State Court be granted and will file his report within one week (This motion was brought City of Renton). |
| Apr 19 | 76 | PLTF'S RESPONSE to Defts' objections to Magistrate's R&R on Defts' Motion to dismiss. |

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| 1982 | | |
| May 5 | 77 | ORDER (1) R&R approved and adopted; (2) Deft (City of Renton) motion to dismiss is denied. cc: Counsel and Magistrate. |
| May 4 | 78 | DEFT (City of Renton) RENEWED MOTION to dismiss Pltfs' amended and supplemental complaint for preliminary and permanent injunction pursuant to FRCP 12(b) (6). |
| May 4 | 79 | MEMORANDUM in support of Deft's renewed motion to dismiss Pltfs' amended and supplemental complaint for preliminary and permanent injunction pursuant to FRCP 12(b) (6). |
| May 4 | 80 | NOTICE of renewed motion to dismiss set for 5/21/82 (oral request). |
| May 4 | 81 | CERTIFICATE OF SERVICE of Motion; Memorandum and Notice on Jack Burns by mail on 5/4/82. |
| May 7 | — | LETTER TO COUNSEL indicating oral argument on Deft's Motion to Dismiss will be changed from 5/21/82 to 1:30 pm 5/28/82. Response brief from Playtime Theatres is due 5/24/82. |
| May 10 | — | LETTER TO COUNSEL setting Preliminary Injunction Hearing on 1:30 pm 6/23/82. Pltf's brief due 6/9/82; Deft's Brief due 6/16/82. |
| May 13 | 82 | PLTF'S MOTION to compel production of documents and for terms. |
| May 13 | 83 | MEMORANDUM in support of motion to compel production of documents and for terms. |

| DATE | NR. | PROCEEDINGS |
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| 1982 | | |
| May 13 | 84 | CERTIFICATE of compliance re LR 37. |
| May 13 | 85 | NOTICE of motion to compel production set for 5/28/82 before Mg. Sweigert. |
| May 14 | 86 | CERTIFICATE OF SERVICE of Motion to compel, memo in support and Notice on Defense counsel by mail on 5/13/83. |
| May 19 | 87 | NOTICE OF DEPOSITION of Rogert H. Forbes by Deft in Kirkland, WA on 5/27/82 at 10:00 am. sub. issued. |
| May 24 | 88 | MEMORANDUM in opposition to Defts' renewed motion to dismiss. |
| May 24 | 89 | CERTIFICATE OF SERVICE of memo in opposition on Mr. Kellogg by mail on 5/21/82. |
| May 24 | 90 | AFFIDAVIT OF SERVICE of subpoena duces tecum on Forbes served 5/19/82 on Jack Burns, attorney. |
| May 24 | 91 | RESPONSE in opposition to Pltfs motion to compel production of documents and for terms. |
| May 24 | 92 | AFFIDAVIT of Lawrence J. Warren in response to Pltfs motion to compel production of documents and for terms. |
| May 24 | 93 | AFFIDAVIT of Daniel Kellogg in opposition to Pltfs' motion to compel production of documents and for terms. |
| May 27 | 94 | AFFIDAVIT OF SERVICE of Response in Opp to Pltf's Motion to Compel; affidavit of Warrent and Kellog on Jack Burns on 5/24/82. |
| May 27 | 95 | DEFTS' MOTION for summary judgment (FRCP 56). |

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| 1982 | | |
| May 27 | 96 | MEMORANDUM in support of Motion for SJ. |
| May 27 | 97 | AFFIDAVIT of David R. Clemens in support of City of Renton's motion for SJ. |
| May 27 | 98 | NOTICE of Deft's motion for SJ (before Sweigert) on 6/18/82. |
| May 27 | 99 | CERTIFICATE OF SERVICE of the Motion for SJ, memo and affidavit on Mr. Burns by mail on 5/27/82. |
| June 1 | 100 | MEMORANDUM ORDER (1) Granting in part Pltf's motion to compel production (map to be produced, ruling on memo reserved) cc: Counsel. |
| June 3 | 101 | BRIEFING SCHEDULE (1) Deft Response Pleading 6/9/82; (2) Pltf Reply Brief, Preliminary Injunction Brief, and Response to Deft's Motion for SJ 6/15/82; (3) all designate live testimony/experts for Preliminary Injunction Hearing 6/15/82; and, (4) Deft's response to Pltf's Preliminary Injunction brief 6/21/82. |
| June 7 | 102 | ORDER granting pltf's motion to compel production of memo. CC: COUNSEL. |
| June 8 | 103 | NOTICE OF DEPOSITION of Lisa Puddy by Defts in Renton, WA on 6/16/82. |
| June 8 | 104 | NOTICE OF DEPOSITION of Playtime Theatres, Inc. representative (for advertising) by Deft in Renton, WA on 6/16/82. |
| June 8 | 105 | CERTIFICATE OF SERVICE of Notice of depositions and request for production of documents on Pltf's counsel by mail on 6/8/82. |

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| 1982 | | |
| June 8 | 106 | PRAECIPE issue subpoenas for depts of Puddy and Playtime rep. Issued. |
| June 9 | 107 | DEFTS' ANSWER to Pltfs' Amended Complaint for Declaratory Judgment and Preliminary and Permanent injunction. |
| June 10 | 108 | AFFIDAVIT OF SERVICE of dep subpoena on Jack R. Burns (via Mrs. Burns) on 6/8/82. |
| June 10 | 109 | AFFIDAVIT OF SERVICE of dep subpoena on Lisa Puddy on 6/8/82. |
| Jun 15 | 110 | MOTION—pltfs for leave to file a brief in excess of 20 pages. |
| Jun 15 | — | LODGED BRIEF—of Playtime Theatres, Inc and Kukio Bay Properties Inc. in response to motion for preliminary injunction and in opposition to depts motion for sj. |
| Jun 15 | 111 | AFFIDAVIT of Bruce Anderson in support of pltfs motion for preliminary inj. |
| Jun 15 | 112 | AFFIDAVIT—of Robert F. Bond. |
| Jun 15 | 113 | DESIGNATION—of live testimony of Jimmy Johnson. |
| Jun 15 | 114 | REPLY—pltfs of Playtime Theatres, Inc and Kukio Bay Properties, Inc. to the Defts answers to pltfs amended and supplemental complaint for declaratory judgment. |
| Jun 15 | 115 | RESPONSE—to subpoena duces tecum. |
| Jun 15 | — | LODGED ORDER. |
| June 15 | 116 | DESIGNATION—of Testimony and experts to be called by deft at the preliminary injunction hearing. |

| DATE | NR. | PROCEEDINGS |
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| 1982 | | |
| Jun 15 | 117 | CERTIFICATE—of service. |
| Jun 17 | 118 | BRIEF of Playtime Theatres, Inc. and Kikio Bay Properties Inc. in support of motion for preliminary injunction and in opposition to Defts' Motion for SJ. |
| Jun 21 | 119 | DEFTS' REPLY BRIEF in opposition to Motion for Preliminary Injunction and in support of Defts' Motion for SJ. |
| Jun 21 | 120 | AFFIDAVIT of Delores A. Mead. |
| Jun 21 | 121 | NOTICE of intent to move the Court to strike Pltfs' brief and motion for preliminary injunction. |
| Jun 21 | 122 | OBJECTIONS to the affidavit of Bruce Anderson in support of PLTFS' motion for preliminary injunction. |
| Jun 21 | 123 | OBJECTIONS to the affidavit of Robert F. Bond. |
| Jun 21 | 124 | AFFIDAVIT of Mark E. Barber. |
| Jun 23 | 125 | NOTICE OF CHANGE of address filed by Pltf's counsel, Mr. Burns. |
| Jun 23 | — | HEARING ON PENDING MOTIONS: Motion (D) to strike Pltf's brief Denied. DFT's motion to strike testimony of Jimmy Johnson DENIED. Deft makes motion Mr. Forbes not testify GRANTED. Deft motion for time to 6/28/82 to respond to excerpts of dep GRANTED. |
| Jun 24 | 126 | ORDER Pltf's motion to file a brief in excess of 20 pages is DENIED. cc Counsel. |
| Jun 28 | 127 | CITY OF RENTON's OBJECTIONS to Pltf's designation of Deposition testimony. |

| DATE | NR. | PROCEEDINGS |
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| 1982 | | |
| July 1 | 128 | AFFIDAVIT OF SERVICE of City's objections on Pltf's counsel. |
| July 16 | 129 | MOTION and affidavit for leave to file supplemental brief in support of Defts motion for SJ and in opposition to Pltfs' motion for Preliminary Injunction. |
| July 16 | 130 | NOTICE of motion for leave to file supplemental brief in support of Defts motion for SJ and in opposition to Pltfs' motion for preliminary injunction set for 8/6/82 before Magistrate. |
| July 16 | 131 | CERTIFICATE OF SERVICE of motion and notice on Pltf's counsel. |
| Jul 29 | 132 | MEMORANDUM—of pltf in opposition to defts motion for leave to file supp brief. |
| Jul 29 | 133 | CERTIFICATE—of service. |
| Sep 2 | 134 | DEPOSITION—of Lisa M. Puddy at defts instance. |
| Sep 2 | 135 | DEPOSITION—of Roger H. Forbes on 4-9-82 at defts instance. |
| Sep 2 | 136 | DEPOSITION—of Roger H. Forbes on May 27, 1982 at defts instance with unattached exhibits. |
| Sep 16 | 137 | ADDITIONAL AUTHORITIES—of pltf in support of motion for preliminary injunction. |
| Sep 16 | 138 | CERTIFICATE—of service. |
| Sep 24 | 139 | RESPONSE—of city of Renton to pltf's additional authorities in support of its motion for preliminary injunction. |
| Sep 24 | 140 | CERTIFICATE—of service. |

| DATE | NR. | PROCEEDINGS |
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| 1982 | | |
| Oct 26 | 141 | CERTIFICATE—of service of cy of ltr to Mag Sweigert on defts by pltf. |
| Nov 5 | 142 | REPORT & RECOMMENDATION—of Magistrate Sweigert . . . recommending Court enjoin enforcement of the city ordinance pending disposition on the merits . . . obj by 11-19-82. |
| Nov 5 | — | LODGED—order. |
| Nov 15 | 143 | OBJECTIONS—of defts to Mag's R&R on defts motion for S/J and renewed motion to dismiss, and pltfs motion for preliminary injunction. |
| Nov 15 | 144 | MOTION—of deft City of Renton for review of Mag's R&R denying defts motion for S/J and renewed motion to dismiss and granting pltfs motion for preliminary injunction. |
| Nov 15 | 145 | NOTICE—of motion and objections 12-3-82. |
| Nov 15 | 146 | CERTIFICATE—of service of #143-145. |
| Nov 24 | 147 | RESPONSE—of Playtime Theatres and Kukio Bay Prop. to Renton's objections to R&R re Preliminary injunction. |
| Nov 24 | 148 | CERTIFICATE—of service of #147. |
| Dec 2 | — | Received copy of City of Renton's petition for writ of mandamus submitted to CCA. |
| Dec 6 | 149 | REPLY—of Renton to pltf's response to Renton's objections to R&R re preliminary injunction. |
| Dec 6 | 150 | CERTIFICATE—of service of #149. |
| Dec 9 | 151 | SUPPLEMENTAL R & R—of Mag. Sweigert obj by 12-23-82. |

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| 1982 | | |
| **Sep 8 | 152 | TRANSCRIPT—of proceedings before Mag. Sweigert 6-23-82. |
| Dec 20 | 153 | MOTION—of City for review of Mag.s suppl R&R of 12-9-82 1-7-83. |
| Dec 20 | 154 | OBJECTIONS—of City to Mags. suppl R&R of 12-9-82. |
| Dec 20 | 155 | NOTICE—of objections 1-7-83. |
| Dec 20 | 156 | CERTIFICATE—of service of #153-155. |
| 1983 | | |
| Jan 13 | 157 | ORDER—denying defts' motions to dismiss and for summary judgment and granting preliminary injunction pendente lite cys mld 1-14-83. |
| Jan 13 | 158 | ORDER—REMANDING C82-263M to King County Superior Court cys mld 1-14-83. |
| Feb 8 | 159 | STIPULATED ORDER—severing damages from pltf's prayer for permanent inj . . . setting hearing on pltf's prayer for permanent inj for 2-10-83 at 2 pm cnsl adv JM cys of order mld 2-9-83. |
| Feb 9 | 160 | SUPPLEMENTAL CITATION—of authorities in support of permanent injunction by pltf. |
| Jan 27 | — | Received copy of supplement to petition for writ of mandamus and/or writ of prohibition as submitted to CCA on perm inj. |
| Feb 10 | — | HEARING—Keith White, reporter . . . argument heard . . . court will give written decision as soon as possible. . . |
| Feb 11 | 161 | MOTION—of City to file supplemental points and auth. |

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| 1983 | | |
| Feb 11 | — | LODGED—memorandum of points & auth in support of defts contention that prelim inj was improvidently granted, and that perm inj must be denied. |
| Feb 11 | — | LODGED—order granting filing of supp points & auth. |
| Feb 11 | 162 | CERTIFICATE—of service. |
| Feb 11 | 163 | APPEAL—notice by City from order denying defts motions to dismiss and for s/j and granting prelim inj pendente lite (#157) (3643). |
| Feb 11 | 164 | CERTIFICATE—of service of #163. |
| Feb 14 | 165 | ORDER—permitting defts to file sup points & auth cys mld 2-14-83. |
| Feb 14 | 166 | MEMORANDUM—of points and auth in support of defts contention the prelim inj was improvidently granted and the perm inj must be denied. |
| Feb 16 | — | Notified CCA and cnsl of filing of appeal. |
| Feb 18 | 167 | ORDER—of WTM vacating the order granting preliminary injunction, plaintiff's prayer for permanent injunction against enforcement of ordinance is denied . . . City of Rentons motion to dismiss for lack of jurisdiction is denied and its motion for summary judgment is granted . . . cnsl adv 2-18-83. |
| Feb 18 | 168 | JUDGEMENT—DENYING pltf's prayer for perm inj . . . DENYING City's motion to dismiss . . . GRANTING City's motion for s/j entered & cys mld 2-22-83. |
| **Feb 17 | 166a | SUPPLEMENTAL AUTHORITY—in support of pltf's prayer for perm inj. |

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| 1983 | | |
| **Feb 17 | 166b | CERTIFICATE—of service of #166a. |
| Feb 25 | 169 | CERTIFICATE—of service of trans desig and order form. |
| Feb 25 | 170 | MOTION—of pltfs for stay (injunction) pending appeal 3-18-83. |
| Feb 25 | 171 | MOTION—of pltfs to alter or amend judgment 3-18-83. |
| Feb 25 | 172 | MEMORANDUM—in support of motion to alter or amend judgment. |
| Feb 25 | 173 | CERTIFICATE—of service of #170-172. |
| Mar 4 | 174 | DESIGNATION—of transcript and order form for 3 separate hearings. |
| Mar 4 | 175 | CERTIFICATE—of service of #174. |
| Mar 14 | 176 | RESPONSE—defts to pltfs memornadum in support of pltfs motion to alter or amend judgment denying pltfs prayer for a permanant injunction against the enforcement of Renton Ordinance No. 3637. |
| Mar 14 | 177 | CERTIFICATE—of service. |
| Apr 6 | 178 | TRANSCRIPT—of proceedings before Mag. Sweigert on 6-23-82 (Keith White). |
| Apr 8 | 179 | CITATION—by pltf of additional authorities. |
| Apr 8 | 180 | CERTIFICATE—of service of #179. |
| Apr 18 | 181 | MOTION—of City for leave to file supplemental points & authorities in the response of City to pltfs motion to alter or amend judgment... |
| Apr 18 | — | MEMORANDUM LODGED—in support of defts contention that prelim inj was im- |

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| 1983 | | |
| | | providently granted and that PI must be denied. |
| Apr 18 | — | LODGED—order permitting defts to file supplemental points. |
| Apr 18 | 182 | CERTIFICATE—of service of above lodged items. |
| Apr 19 | 183 | TRANSCRIPT—of hearing on motion for TRO before Mag. Sweigert on 1-29-82. |
| Apr 19 | — | Received copy of certificate of record as to #183 . . . mailed original to CCA. |
| Apr 20 | 184 | ORDER—permitting defts to file supp points and authorities cys mld 4-21-83. |
| Apr 20 | 185 | MEMORANDUM—of supplemental points and authoritesin support of defts contention that PI was improvidently granted and the PI must be denied. |
| Apr 29 | 186 | ORDER—denying pltf's motions to alter and amend judgment and for stay pending appeal cys mld 4-29-83. |
| May 10 | 187 | APPEAL—notice by pltfs from judgment entered 2-18-83 and from order of 4-29-83. |
| May 10 | 188 | CERTIFICATE—of service of #187. |
| May 11 | — | Notified CCA and cnsl of filing of appeal. |
| May 31 | 189 | ORDER—of CCA in 83-3643 . . . parties are to file memoranda addressing issue of whether this appeal is moot . . . to be mailed by 6-15-83. . . . |
| Jun 6 | 190 | TRANSCRIPT DESIGNATION—of pltf for appeal 83-3805 (will use transcripts ordered for previous appeal). |

| DATE | NR. | PROCEEDINGS |
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| 1983 | | |
| Jun 17 | 191 | ORDER—of CCA (83-3805) denying appellants' motion for stay or injunction pending appeal. . . |
| Jul 25 | — | Mailed CCA cert of record for appeal 83-3805 with cy of #190. |
| Aug 3 | 192 | ORDER—of CCA (83-3805) setting briefing sked . . . appellants brief by 10-21-83 . . . appellees brief by 12-19-83 . . . reply brief w/in 21 days of service date of appellees brief . . . appeal to be argued in Feb or Mar of 1984. |
| Sep 6 | 193 | ORDER—of CCA (83-3805) consolidating this appeal with CCA83-3980 (C83-744C) for all purposes . . . briefing sked set in 83-3805 will apply. . . |
| Sep 23 | 194 | ORDER AND JUDGMENT—from CCA (83-3643) dismissing appeal as moot . . . entered and cys mld 9-26-83. |
| Nov 2 | 195 | TRANSCRIPT—of proceedings before Judge McGovern on 2-10-83. |
| Nov. 8 | 196 | DESIGNATION—of clerk's record by pltf/appellant (3805). |
| Nov 9 | 197 | ORDER—of CCA (3805/3980) granting appellant's motion for extension of time to file opening brief . . . appellants to file brief by 11-11-83 . . . appellees brief due 1-16-84. . . |
| 1984 | | |
| Jan 16 | 198 | ORDER—of CCA . . . appellee City's motion to extend brief filing time to 2-15-84 is granted . . . appellant Playtime's motion for extension of time is denied as moot |

| DATE | NR. | PROCEEDINGS |
|---------|-----|---|
| 1984 | | |
| | | . . . appellants reply brief due 21 days of service date of appellees brief. |
| Apr 19 | 199 | DESIGNATION—of clerk's record by appellee. |
| Apr 24 | — | Submitted copy of designated record to Vivian Thompson, Circuit office in Seattle per verbal instructions of Betty Parshall of San Francisco. Cnsl advised of submission. |
| Apr 25 | — | Hand delivered the designated trial exhibits to Vivian Thompson, Circuit office in Seattle. |
| Dec 24 | 200 | JUDGMENT of CCA that judgment of DC is reversed in part, 83-3805 remanded in part. (ent 12/26/84) cc to WTM, cnsl. (Copy in C83-744C). |
| 1985 | | |
| Jan 4 | 201 | JUDGMENT from CCA that costs in amt of \$1,098.20 are taxed against City of Renton, appellee, for Playtime Theatres, appellant. (ent & mailed 1/4/85). |
| 1/3/85 | 202 | MOTION of pltf for entry of judgment NOTED: 1/18/85. |
| " | 203 | MEMORANDUM of points & authorities in support of #202. |
| 1/12/85 | 204 | MOTION of defts for stay of proceedings Note date incorrect—cnsl called. |
| " | 205 | OBJECTION of defts to mtn for entry of judgment or alternatively request for addtl time to respond. |
| " | 206 | CERTIFICATE of srvc of #204 & 205. |

PLAYTIME THEATRES, INC., a Washington corporation,
and
KUKIO BAY PROPERTIES, INC., a Washington corporation,
Plaintiffs,
vs.
THE CITY OF RENTON, *et al.,*
Defendants.

**AFFIDAVIT OF DAVID R. CLEMENS, POLICY
DEVELOPMENT DIRECTOR OF CITY OF RENTON**

STATE OF WASHINGTON)
) SS
COUNTY OF KING)

DAVID R. CLEMENS, being first duly sworn on oath,
deposes and states:

I am the Policy Development Director of the City of Renton. Commencing on January 5, 1981 and continuing until December 1, 1981, I was the Acting Planning Director of the City of Renton.

The City of Renton is located at the southeast end of Lake Washington. The 1981 population of the City is 32,200; the extended service area of the City of Renton is approximately 70,000 persons. The population of the City during daytime, including the large industrial manufacturing plants of The Boeing Company and Pacific Car

& Foundry Company, is approximately 50,000 persons. The City of Renton comprises 15.3 square miles. The Renton School District No. 403, whose boundaries are not identical with the city limits of the City of Renton, but are clearly within the service area of the City of Renton, has 14 elementary schools, 3 middle schools and 3 high schools, together with special and alternative education facilities and a vocational-technical institution. Within the city limits are 62 churches representing all major denominations. The City has recreational facilities including 18 parks, including two waterfront parks on Lake Washington, 3 public swimming pools and the Cedar River Trail which includes an existing path for joggers, etc., and a nature trail along the Cedar River which is being developed. The senior citizens recreation center on the Cedar River is a principal recreation source for senior citizens and the surrounding service area. Shopping and commercial activity areas are located throughout the community in neighborhood shopping center clusters, with major shopping facilities being divided into four major nodes: the downtown business district along Second and Third Avenues; the Renton Shopping Center located along Rainier Avenue; the Renton Village Shopping Center located along Grady Way; and the Highlands shopping area located along Sunset Boulevard Northeast. Land uses within the City of Renton as of October 1980 are estimated to occupy the following acres within the City of Renton:

| | |
|------------------------------|-------------|
| Single family residential | 2025 |
| Multi-family residential | 415 |
| Commercial | 385 |
| Public—quasi-public | 570 |
| Parks and recreation | 500 |
| Agricultural | 90 |
| Industrial | 1205 |
| Major arterials and freeways | 710 |
| Undeveloped | 3735 |
| TOTAL | 9635 |

One of my principal responsibilities is to assist the Mayor's office and the City Council to study and implement land use regulations within the City of Renton. I have personal knowledge of the matters relating to the development of the land use regulations which were ultimately adopted as Ordinance No. 3526. I was present at all meeting of the City Council and its Planning and Development Committee, and in particular the public meeting that was held on March 5, 1981 at which time the City Council took comments from interested citizens, educators, clergymen and businessmen on this subject matter.

The City Council dealt with the issue of regulation of adult entertainment land uses without the influence of a pending adult entertainment land use proposal. The Council considered comments from the land use planning professionals in my office as well as a comprehensive report from the City Attorney's office relating to the proper scope of land use regulations and experience from other cities. At all times, the City Council was advised that it was inappropriate to entirely ban adult entertainment land use from the City.

After the Committee had concluded its study of the alternatives which were available to the City for regulation of adult entertainment land uses, the Committee sought comment from the general public on the matter at a public meeting held on March 5, 1981. Sixty-four (64) persons were in attendance, with 28 persons speaking on the issue. In attendance were residents of the city, residents of other areas outside the city who use the City of Renton for shopping and employment, educators, including the Superintendent of the Renton School system, clergymen from churches within the City and the surrounding area, representatives of the local feminist organization and members of the business and professional community including the Manager of the Greater Renton Chamber of Commerce. The testimony presented to the Committee consistently noted adverse impact upon neigh-

borhoods and businesses within the City of Renton in the event that an adult entertainment land use was situated in close proximity to schools, churches, public or quasi-public buildings, businesses, and residential zones or uses. Numerous speakers, including the Superintendent of schools, expressed concern about the adverse effect caused by children walking past and in the vicinity of adult entertainment land uses on their way to and from school. Several speakers noted that adult theaters and other similar uses are not similar to other commercial activities in that their impact extends beyond the limits of the immediate location. As a result, the general population of the City of Renton is confronted with an intrusion into its life style of an activity over which it may have little control. In effect, even if the general population chooses not to patronize the establishment, the adverse effect upon the community still remains. Several speakers commented upon the adverse impacts which adult entertainment land uses would have upon property values within the business and residential community of the City of Renton if such uses were allowed in close proximity to the uses mentioned above. At more than one point speakers noted the deterioration of business and community neighborhoods in the City of Seattle which had recently prompted Seattle to impose location regulations upon adult theaters. The proximity between the location of schools and the location of adult theaters was a point of serious concern to many individuals present. The Renton School District provides bussing service for elementary students whose homes are located more than one mile from the school. That was the basis of the City Council's adoption in the ordinance of the one-mile radius from schools. Several speakers noted that they choose to walk to stores, churches or other public services in their neighborhoods as an alternative to driving their car. Later reports to the Committee from my office provided the information that public transit and retail service reports show that the maximum distance the average person will walk to public

transit or shopping activities is one quarter mile. This was the basis for adoption of the 1000 foot radius from residential, churches, or public and quasi-public uses.

The Planning and Development Committee later met to evaluate the comments received at the public meeting and from staff. Their conclusion was that the public had expressed sufficient concern and provided detailed examples from the City of Seattle, Tacoma and other cities to conclude that adult motion picture theaters should be regulated within the City of Renton on the basis of location. The Committee further concluded that the area of most concern to the committee was the protection and preservation of its residential areas and the accessory land uses such as schools, parks, churches and other public and quasi-public land uses.

The Planning and Development Committee presented its recommendation to the full Council of the City of Renton. The full City Council considered the report of the Planning and Development Committee, including the issues which had been previously raised by the city staff and the public at the public meetings. Based upon the comments, recommendations and debate on the floor of the Committee, the City Council adopted the proposed ordinance on April 23, 1981 as Ordinance No. 3526.

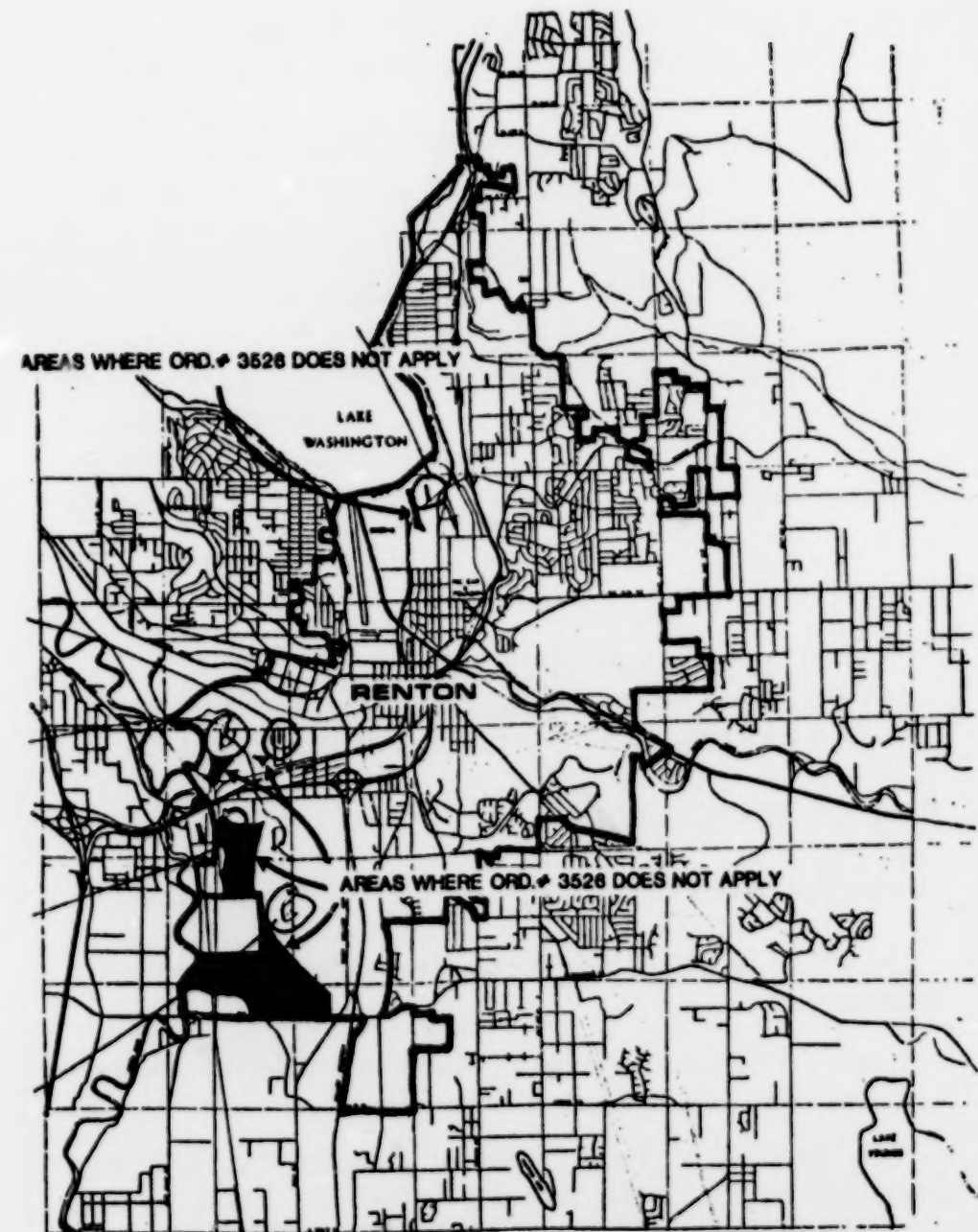
The adoption of the ordinance was based upon good zoning principles and was founded upon extensive public testimony and research of such matters of location regulation of adult entertainment land uses. The Council adopted standards for location of adult entertainment land uses based upon the express concern that certain types of land use activities, parks, residential neighborhoods, schools and churches would be adversely impacted by adult motion picture theaters. As a result, the Council developed criteria for location of adult theaters in order that they would not improperly and adversely effect the stability of the community of the City of Renton.

The location regulations adopted in Ordinance No. 3526 do not eliminate the location of an adult theater within the City of Renton. As illustrated on the attached map of the City of Renton, there is approximately 400 acres of land within the City of Renton which does not fall within the location regulations. With two exceptions, the property in question is undeveloped. Most of the parcels of property within the 400 acres is appropriately zoned for adult theater use. Furthermore, pursuant to the Comprehensive Plan of the City of Renton, all of the locations are designated as being appropriate for commercial activities, thus paving the way for re-zoning of those properties which are not presently zoned for adult theater uses.

By way of comparison, the ordinance of the City of Seattle which has been upheld by the Washington State Supreme Court provides an area of only 250 acres in the central business district of the City in which adult theaters may be located. The City of Seattle has a total acreage of 56,320 acres. The area available for adult theaters comprises less than .044% of the total acreage in the City. On the contrary, the City of Renton has a total average of 9,635 acres with approximately 400 acres or 4.1% of the City's land area available for development of adult theaters. This is nearly ten times the proportionate area of the City of Seattle. Renton's population is 7% of Seattle's.

The result of the location regulations set forth in the ordinance is an ordinance which will protect the vitality, economic health and business welfare of its citizens from adverse effects of adult theater uses, without prohibiting the rights of its citizens to patronize such theaters if the uses choose to locate within the City of Renton. In any event, adult entertainment uses are widely available within the City of Seattle and King County generally.

* * * *



BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. C82-59M

PLAYTIME THEATRES, INC., a Washington corporation,
and KUKIO BAY PROPERTIES, INC.,
a Washington corporation,
Plaintiffs,

vs.

THE CITY OF RENTON, *et al.*,
Defendants.

**AFFIDAVIT OF GARY F. KOHLWES,
SUPERINTENDENT OF RENTON SCHOOL DISTRICT
AND SECRETARY OF RENTON SCHOOL BOARD**

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

GARY F. KOHLWES, being first duly sworn on oath,
deposes and states:

I am the Superintendent of the Renton School District
and Secretary of the Renton School Board.

The position of Renton School District No. 403 was
presented at the public meeting before the Planning and
Development Committee of the Renton City Council on
March 5, 1981, and remains the same to this date. The
School District strongly supports the regulation as
adopted by the City Council of the City of Renton to
prohibit the location of an "adult motion picture theater"
within a radius of one mile surrounding a public school.

The regulations of the School District covering student
transportation varies by grade level. Students in kinder-
garten through sixth grade are transported by bus if
they reside one mile or more from their school. Students
in grades 7 and 8 are transported by bus if they reside
more than 1.5 miles from their school. Students in grades
9 through 12 are transported if they reside more than
two miles from their school. The intention of the School
Board in imposing the one mile location on "adult motion
picture theaters" was to prevent negative impact upon
elementary school children walking to and from school.
This position was reaffirmed by the Renton School Board
at its regularly scheduled meeting on January 21, 1982.

* * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. C82-0059M

PLAYTIME THEATRES, INC., a Washington corporation,
and KUKIO BAY PROPERTIES, INC.,
a Washington corporation,
Plaintiffs,

vs.

THE CITY OF RENTON, *et al.*,
Defendants.

**AFFIDAVIT IN SUPPORT OF MOTIONS FOR
TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

Jack R. Burns, being first duly sworn on oath, deposes and says:

1. I am one of the attorneys for the plaintiffs herein and I am authorized to make this affidavit on their behalf in support of their motion for a Temporary Restraining Order and their motion for a Preliminary Injunction.

2. Since the filing of the Complaint herein, your affiant has had an opportunity to review the legislative history of City of Renton Ordinance No. 3526 by reviewing the record generally available to the public. Excerpts of the Minutes of the Renton City Council relating to this Ordinance and other pertinent documents are attached

hereto as Exhibits 1 through 12 and are incorporated herein by reference. These exhibits reveal the following legislative history:

(1) Exhibit 1 reflects that on June 23, 1980 the Renton City Council undertook to study the subject of adult book stores, films and novelty shops by referring that matter to the Planning and Development Committee of the City Council.

(2) On September 8, 1980, as disclosed by Exhibit 2, the Planning and Development Committee of the City Council recommended to the City Council that the matter be referred to the Planning Commission for consideration. That recommendation was adopted by the Renton City Council at their meeting of September 8, 1980 and the matter was referred to the Planning Commission for consideration at the earliest possible date and for the holding of public hearings. This action is documented in Exhibit 3.

(3) The Minutes of the Renton City Council of October 13, 1980 indicate that on that date a moratorium resolution was adopted relative to the licensing of businesses selling or showing sexually explicit materials. The relevant portions of the Minutes of October 13, 1980 are attached hereto as Exhibit 4.

(4) Exhibit 5 is a copy of Resolution No. 2368 which places a moratorium on the issuance of business licenses to businesses selling or showing sexually explicit materials. To the extent that any government interest is set forth in the legislative history of City of Renton Ordinance No. 3526, it is contained in the "whereas" provisions of Resolution No. 2368. There, the only reason asserted for the ordinance is an undocumented, unstudied, and speculative perception that a business which sells, rents or exhibits sexually explicit material would have a severe impact upon surrounding businesses and residences.

(5) The Renton City Council Minutes of December 1, 1980, Exhibit 6, indicate that the chairman of the Planning Commission referred the adult entertainment matter back to the Council for further action indicating that the Planning Commission is overburdened with priorities of a much greater magnitude than the regulation of adult entertainment land uses.

(6) The Renton City Council Minutes of February 9, 1981, Exhibit 7, indicate that the public did not respond to notices of a meeting to consider adult entertainment land use regulation. Accordingly, another meeting was scheduled for March 5, 1981. Exhibit 8 is a copy of the public notice for the March 5, 1981 meeting. As associate of your affiant, Glenna Bradley-House, has been advised that no more than a dozen members of the public attended the public meeting had on March 5, 1981.

(7) On April 6, 1981 the Planning and Development Committee of the Renton City Council filed its report relative to adult entertainment land use. This report is Exhibit 9 in the materials attached hereto. The report sets forth no findings relative to the need for such an ordinance nor does it spell out in any way any compelling governmental interest that would be served by the regulation of adult uses. Finally, no reasons or need are specified for the locational requirements suggested by the report. From this record, it is impossible to determine from the legislative history that the means chosen to implement a compelling governmental interest (if there be one) are the least intrusive to First Amendment freedoms and that there is a clear, direct and definitive connection between the means and the end.

(8) Exhibit 10 is an excerpt of the Renton City Council Minutes of April 6, 1981 wherein the report of the Planning and Development Committee is received and the Council concurs in its recommendation and forwards it to the Ways and Means Committee for preparation of an ordinance. Exhibit 11 is an excerpt of the Renton City Council Minutes of April 13, 1981 wherein Ordinance No. 3526 had its second reading and was adopted by the Renton City Council.

nance No. 3526 had its second reading and was adopted by the Renton City Council.

(9) Attached hereto as Exhibit 12 is a copy of Ordinance No. 3526. Nowhere in the body of that ordinance are there findings of any sort which set forth or describe a governmental interest of any sort, let alone a compelling governmental interest, which would justify a burden on protected First Amendment freedoms.

(10) Any restraint or burden upon a constitutionally protected medium of expression comes into court bearing a heavy presumption against its constitutionality. The city must bear the burden of showing a compelling governmental interest. The legislative history of Ordinance No. 3526 is barren of any governmental interest being asserted, let alone one that would justify the broad and sweeping intrusion upon protected First Amendment expression that Ordinance No. 3526 accomplishes.

* * * *

EXHIBIT 1

Renton City Council
6/23/80 Page 3
Consent Agenda—Continued

* * * *

Areas of Location Adult Films, etc.

MOVED BY STREDICKE, SECOND TRIMM, THE
SUBJECT OF ADULT BOOKSTORES, FILMS
AND NOVELTY SHOPS BE REFERRED TO
PLANNING AND DEVELOPMENT COMMIT-
TEE. CARRIED.

* * * *

EXHIBIT 2

PLANNING AND DEVELOPMENT COMMITTEE
COMMITTEE REPORT
SEPTEMBER 8, 1980

*REGULATION OF ADULT ENTERTAINMENT LAND
USES* (referred 6/23/80)

The Planning and Development Committee has considered the question of regulation of adult entertainment land uses and recommends that the City Council refer the matter to the Planning Commission for consideration at the earliest possible date. The Committee recommends that the Planning Commission be directed to hold public hearings at the earliest possible date on the subject of possible amendments to the Comprehensive Plan and amendments to the Zoning Code as may be desirable to regulate adult entertainment land uses within the City of Renton.

/s/ Randy Rockhill

RANDY ROCKHILL, Chairman

EARL CLYMER

JOHN REED

EXHIBIT 3

Renton City Council

9/8/80 Page

Consent Agenda

* * * *

Adult Entertainment Land Uses

Planning and Development Committee report recommended referral of matter re regulation of adult entertainment land uses to the *Planning Commission* for consideration at the earliest possible date and hold a public hearing for possible amendments to the Comprehensive Plan and zoning code. MOVED BY ROCKHILL, SECOND REED, TO CONCUR IN THE COMMITTEE RECOMMENDATION. CARRIED.

* * * *

EXHIBIT 4

Renton City Council

10/13/80 Page

Old Business—Continued

* * * *

Resolution #2368 Moratorium Licensing of Adult Entertainment

A resolution was read declaring a 120 day moratorium on the licensing of businesses selling or showing sexually explicit materials, containing automatic extension of 90 days should pending Planning Commission report. MOVED BY STREDICKE, SECOND CLYMER, ADOPT THE RESOLUTION AS READ. CARRIED.

* * * *

EXHIBIT 5

RESOLUTION NO. 2368

A RESOLUTION OF THE CITY OF
RENTON, WASHINGTON, DECLARING
A MORATORIUM ON THE LICENSING OF
BUSINESSES SELLING OR SHOWING SEXUALLY
EXPLICIT MATERIALS

WHEREAS the City of Renton is a residential city with a discreet business area; and

WHEREAS the residential areas and the business areas, in all instances, are located in close proximity to one another; and

WHEREAS sexually explicit material, including books, magazines, pictures, and movies, whether sold, rented, or showed on premises, may legitimately be controlled by a municipality, either through gathering in one location, or separating from other uses which will be inordinately impacted by the sale, rental or showing of sexually explicit materials; and

WHEREAS the City of Renton does not, at the present time, have any business whose primary purpose is the sale, rental, or showing of sexually explicit materials; and

WHEREAS the subject matter has been referred to the Planning Commission of the City of Renton for study and report back; and

WHEREAS the establishment of a business which, as its primary purpose, sells, rents, or exhibits sexually explicit material would have a severe impact upon surrounding businesses and residences:

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF RENTON DO RESOLVE AS FOLLOWS:

1. The above findings are found to be true and correct in all respects.

2. There is hereby established a moratorium against the granting of any business license to any business to be established within the City Limits of the City of Renton, which business has as its primary purpose the selling, renting or showing of sexually explicit materials. Such moratorium shall be in effect for the period of one hundred twenty (120) days, but shall be automatically extended for a period of further ninety (90) days, should a report and recommendadtion from the Renton Planning Commission not be received by the Renton City Council, and acted upon by the Council, within such time period.

3. *Definition.* For the purpose of this Resolution sexually explicit materials shall be those materials which show, portray, describe or otherwise primarily relate to sexual intercourse, or excretory functions, or which portray or show male or female genitalia, the breasts, anus, buttocks, and which are primarily intended to appeal to the erotic interest, whether or not the same could be defined as obscene or not.

PASSED BY THE CITY COUNCIL this 13th day of October, 1980.

/s/ Delores A. Mead
DELORES A. MEAD
City Clerk

APPROVED BY THE MAYOR this 13th day of October, 1980.

/s/ Barbara Y. Shinpoch
BARBARA Y. SHINPOCH
Mayor

Approved as to form:

/s/ Lawrence J. Warren
LAWRENCE J. WARREN
City Attorney

EXHIBIT 6

Renton City Council

12/1/80 Page

* * *

Adult Entertainment Land Uses

Letter from Planning Commission Chairman Michael Porter acknowledged consideration of Council referral of adult entertainment land uses by its Special Studies Committee. The Commission concurred in the recommendation of the Committee to refer the matter back to the Council for further action, suggesting Council Committee and citizens' committee. The letter stated the Commission is overburdened with priorities in need of immediate action and regretted inability to handle the referral. Refer Adult Entertainment Land Uses to the *Planning and Development Committee*.

* * *

EXHIBIT 7

Renton City Council

2/9/81 Page

Old Business—Continued

* * *

Planning and Development Adult Entertainment

Planning and Development Committee Chairman Rockhill reported that the public did not respond to notices of meeting on adult entertainment land use. Rockhill rescheduled meeting for 3/5/81 4:30 p.m. for meeting with the public.

* * *

EXHIBIT 8

THE RENTON CITY COUNCIL
Municipal Building • 200 Mill Avenue South
Renton, Washington 98055 • 235-2586

February 10, 1981

NOTICE OF PUBLIC MEETING
PLANNING & DEVELOPMENT COMMITTEE
RENTON CITY COUNCIL

DATE: March 5, 1981

TIME: 4:30 P.M.

PLACE: Sixth Floor Conference Room
Municipal Building
200 Mill Avenue South
Renton, Washington

PURPOSE OF MEETING

The Renton City Council's Planning & Development Committee will review the subject of adult entertainment land uses.

Representatives from the general business community and interested citizens are invited. The meeting will be informal. Input may be given orally or in writing. If you have any question, please phone the Council secretary at 235-2586.

RANDY ROCKHILL, Chairman
Planning & Development Committee

cc: Planning Department
Planning Commission
Police Department
City Attorney

EXHIBIT 9

PLANNING AND DEVELOPMENT COMMITTEE
COMMITTEE REPORT
APRIL 6, 1981

ADULT ENTERTAINMENT LAND USE—
(Referred 12/1/80)

The Planning and Development Committee, after considerable review of this subject, including two meetings where public input was received, feel that it is in the best interest of the City of Renton and the desire of its citizens to provide regulation for the so-called adult motion picture theater location.

Therefore the Committee recommends:

1. That the Council concur and refer the subject to the Ways and Means Committee for the appropriate ordinance.
2. That the ordinance be written to reflect the following desired conditions:
 - a. No adult motion picture theater will be allowed in any area used or zoned residential or in any P-1 public use area.
 - b. A suitable buffer strip of 1000 feet from any residential or P-1 area also be a banned area.
 - c. The area enclosed in a one mile radius of any school (this is the minimum student walking distance) would also be a banned area.

RANDY ROCKHILL, Chairman

EARL CLYMER

JOHN REED

EXHIBIT 10

Renton City Council

4/6/81 Page 5

Correspondence and Current Business—Continued

* * *

Planning and Development Committee Adult Entertainment Land Use

Planning and Development Committee Chairman Rockhill presented committee report which recommended that Council concur that it is in the best interest of the City and is the desire of its citizens to provide regulation for the so-called adult motion picture theater location. Also recommended: that the ordinance be written to reflect the following desired conditions: (a) No adult motion picture theater be allowed in any area used or zoned residential of P-1 public use area; (b) A buffer strip of 1000 feet from any residential or P-1 area also be a banned area; (c) The area enclosed in a one mile radius of any school also be banned area (minimum student walking area). The report recommended Council concurrence and referral to the *Ways and Means Committee* for ordinance. MOVED BY CLYMER, SECOND ROCKHILL, CONCUR IN REPORT. CARRIED.

* * *

EXHIBIT 11

Renton City Council

4/13/81 Page

Old Business Continued—

Public Safety Committee—Continued

* * *

Ordinance #3526 Adult Motion Picture Theater Zoning

The committee report recommended second and final readings of an ordinance relating to land use and zoning for adult motion picture theaters. Following reading, MOVED BY HUGHES, SECOND ROCKHILL, ADOPT THE ORDINANCE AS READ. ROLL CALL: 5-AYE: AYES: STREDICKE, REED, TRIMM, HUGHES, ROCKHILL; ONE NO: SHANE. CARRIED.

* * *

EXHIBIT 12

CITY OF RENTON, WASHINGTON

ORDINANCE NO. 3526

AN ORDINANCE OF THE CITY OF RENTON, WASHINGTON, RELATING TO LAND USE AND ZONING.

THE CITY COUNCIL OF THE CITY OF RENTON, WASHINGTON, DO ORDAIN AS FOLLOWS:

SECTION I: Existing Section 4-702 of Title IV (Building Regulations) of Ordinance No. 1628 entitled "Code of General Ordinances of the City of Renton" is hereby amended by adding the following subsections:

1. "*Adult Motion Picture Theater*": An enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characterized by an emphasis on matter depicting, describing or relating to "specific sexual activities" or "specified anatomical areas" as hereafter defined for observation by patrons therein.

2. "*Specified Sexual Activities*":

- (a) Human genitals in a state of sexual stimulation or arousal;
- (b) Acts of human masturbation, sexual intercourse or sodomy;
- (c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

3. "*Specified Anatomical Areas*"

- (a) Less than completely and opaquely covered human genitals, pubic region, buttock, and

female breast below a point immediately above the top of the areola; and

- (b) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

SECTION II: There is hereby added a new Chapter to Title IV (Building Regulations) of Ordinance No. 1628 entitled "Code of General Ordinances of the City of Renton" relating to adult motion picture theaters as follows:

A. Adult motion picture theaters are prohibited within the area circumscribed by a circle which has a radius consisting of the following distances from the following specified uses or zones:

- 1. Within or within one thousand (1000') feet of any residential zone (SR-1, SR-2, R-1, S-1, R-2, R-3, R-4 or T) or any single family or multiple family residential use.
- 2. One (1) mile of any public or private school.
- 3. One thousand (1000') feet of any church or other religious facility or institution.
- 4. One thousand (1000') feet of any public park or P-1 zone.

B. The distances provided in this section shall be measured by following a straight line, without regard to intervening buildings, from the nearest point of the property parcel upon which the proposed use is to be located, to the nearest point of the parcel of property or the land use district boundary line from which the proposed land use is to be separated.

SECTION III: This Ordinance shall be effective upon its passage, approval and thirty days after its publication.

PASSED BY THE CITY COUNCIL this 13th day of
April , 1981.

/s/ Delores A. Mead
DELORES A. MEAD
City Clerk

APPROVED BY THE MAYOR this 13th day of April
, 1981.

/s/ Barbara Y. Shinpoch
BARRARA Y. SHINPOCH
Mayor

Approved as to form:

/s/ Lawrence J. Warren
LAWRENCE J. WARREN
City Attorney

Date of Publication: May 15, 1981

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C82-59M

PLAYTIME THEATRES, INC., a Washington corporation,

and

KUKIO BAY PROPERTIES, INC., a Washington corporation,
Plaintiffs,

vs.

THE CITY OF RENTON, *et al.,*
Defendants.

[Filed Feb. 10, 1982]

Testimony of David R. Clemens on January 29, 1982,
before the Honorable Philip K. Sweigert, United States
Magistrate.

[3]

APPEARANCES:

For the Plaintiffs:

HUBBARD, BURNS & MEYER

By Jack R. Burns

Attorney at Law

10604 N.E. 38th Place

Suite 105

Kirkland, Washington 98033

and, of Counsel

Robert Eugene Smith

Attorney at Law

For the Defendants:

WARREN & KELLOGG, P.S.

By Lawrence J. Warren and

Daniel Kellogg

Attorneys at Law

100 South Second Street

Renton, Washington 98057

and

Mark Barber

Attorney at Law

123 Third Avenue South

Suite 2200

Seattle, Washington 98104

INDEX

WITNESS:

PAGE

DAVID R. CLEMENS

Direct by Mr. Smith

4

Cross by Mr. Warren

39

Redirect by Mr. Smith

50

Recross by Mr. Warren

55

Further Redirect by Mr. Smith

57

EXHIBITS FOR IDENTIFICATION

I.D. ADM.

Plaintiffs' Exhibits Nos.:

1

7

38

2

12

38

3

19

38

4

19

38

5

20

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[4] DAVID R. CLEMENS,
called as a witness on behalf of the Plaintiffs, having
been duly sworn, was examined and testified as follows:
THE CLERK: Would you state your full name and
spell your last name for the record, please.
THE WITNESS: David R. Clemens, C-L-E-M-E-N-S.

DIRECT EXAMINATION

BY MR. SMITH:

Q. Mr. Clemens, would you tell the Court what your
present occupation is?

A. I'm the policy development director for the City of
Renton.

Q. Would you tell us what that means, sir?

A. The policy development director is responsible for
comprehensive planning for the City of Renton, which
would include land use, utilities, other aspects.

Q. What position did you hold in May of 1981?

A. I was the acting planning director for the City of
Renton.

Q. Is there still a planning director presently?

A. No, there is not.

Q. All right. Now, you made an affidavit, did you
not, sir, in connection with the response to the lawsuit
[5] before the Court?

A. Yes, I did.

Q. Do you have a copy of your affidavit with you?

A. Not in my hands, no, sir.

MR. SMITH: May I approach the witness, your
Honor?

THE COURT: Yes.

MR. SMITH: Thank you.

THE COURT: If you hand it to the Clerk, the Clerk
will provide it to him.

(Document handed to the witness.)

Q. (By Mr. Smith) Would you look through that
document and tell me whether or not you recognize the
same? Would you look through that?

A. Yes, I do.

Q. Now, do you see at Line 4 where you discussed the
possibility of how many acres are available for an adult
use to locate?

A. Yes, I do.

Q. What do you say generally about that? What do
you talk about? How many acres are available?

A. The affidavit indicates that there are approxi-
mately 400 acres that comply with the ordinance.

Q. How many parcels of land, sir?

[6] A. Does it not state.

Q. Did you designate that on the map that's attached
to that affidavit?

A. Yes, I did.

Q. Who did the designation on that map?

A. My office.

Q. All right, sir. Now, taking the designation that
you have on your map, would you turn to the map that
you have there, please? The top item, the top location for
an adult use, do you know where that is specifically, sir?

A. Yes, I do.

Q. Where is it?

A. It's located within the Boeing Industrial Complex.

Q. Is there a security gate that makes it necessary to
go through there to—

THE COURT: Counsel, may I ask that if you're
going to ask him to refer a particular area, refer to it
more explicitly than the top. Two of them look awful
close and I'm not at all sure of which one you're talking
about. So for the purpose of the record, let's make it as
clear as possible.

MR. SMITH: Your Honor, we'd like to have the zon-
ing map of Renton, Washington, indicating an effective
date of June, 1981, entered in evidence as [7] Plaintiffs'
Exhibit 1.

The COURT: Will you have it marked?

THE CLERK: It will be marked as Plaintiffs' Exhibit No. 1.

(Plaintiffs' Exhibit No. 1 marked for identification.)

Q. (By Mr. Smith) All right, sir. Now, you have a smaller map which is attached to your affidavit; isn't that correct?

A. Yes, there is.

Q. All right. Now, sir, would you show us on the Exhibit 1 where the area is that you said refers to as Boeing?

A. The parcel in question would be located almost central on that map.

Q. Would you just point to it?

A. Yes, I will.

Q. Is it fair to say the area that I'm pointing to? Do you adopt that?

A. That's correct.

MR. SMITH: Counsel?

THE COURT: Mark it or something so that we know what he's referring to.

MR. WARREN: Your Honor, maybe for the ease of the Court, Mr. Clemens has a larger-size map [8] which he himself prepared for court today after we heard that he had been subpoenaed. That would be his actual work product rather than relying on that map that somebody else—

THE COURT: Is it the same type of map?

MR. WARREN: It is just about the same size, I believe.

THE COURT: Why don't you let counsel see it and perhaps that should be the exhibit presented to the Court.

(Brief pause.)

MR. SMITH: It appears to be the same and I would ask the withdrawal of that which has been marked as

Exhibit 1 and use that, with the permission of the Court, that has been prepared by the witness.

THE COURT: Whether it's admitted as Plaintiffs' or Defendants' doesn't seem to matter. Go ahead and mark it as Plaintiffs' exhibit or a Defendants' exhibit. I don't care which it is.

THE CLERK: This will be marked as Plaintiffs' Exhibit 1.

MR. WARREN: If it will help, your Honor, I'll provide my copy.

Q. (By Mr. Smith) Mr. Clemens, you have designated on this zoning map which is marked as Plaintiffs' Exhibit [9] 1, area A, and there is a green area with red ink on the outside. Is the green area one of the areas that you indicated was available for location of adult theatre use?

A. That's correct.

Q. Now, you indicated that you're personally familiar with that area?

A. Yes, I am.

Q. And that, I believe you testified, was the Boeing Company?

A. That's correct.

Q. Do you know what is located in that very area?

A. The Boeing-Renton Manufacturing Complex.

Q. Is there a security gate that keeps people from coming and going in there, sir?

A. Yes.

Q. So this area that you talked about is already being used by the Boeing Company and there is a security gate that people have to pass through to get in; is that correct?

A. That's correct.

Q. Now, the next area you've designated is area B?

A. B.

Q. And area B is a place that is indicated on the corner of the map, and underneath it is written the word [10] "disposal." Would you tell the Court what is located at the area that's marked in green, area B?

A. There are, I believe, three uses in that general area. First is the Renton Metro Sewer Treatment Plant. Second is a vacant property. The third is a partially-abandoned railroad right-of-way.

Q. Now, how broad is the area? How many acres are located on area B?

A. I have no idea, sir.

Q. How much of it is part of the disposal area?

A. A substantial portion of it.

Q. Three-quarters of it?

A. Possibly.

Q. Or it may even be more; isn't that correct?

A. Possibly.

Q. Now, taking the area that you designated as area C, would you tell us what's located there?

A. There are no uses at that site at this time.

Q. Ever heard of Koll Office & Shopping Center Developers?

A. Yes, I have.

Q. Do you know they are developing that whole area there?

A. Yes, I do.

Q. Well, then, there is a use that's being put to that, isn't there? Aren't there signs up that way, "For Sale" and "For Rent" and construction laid out in that [11] area?

A. Not to the best of my knowledge, not at that location.

Q. When was the last time that you looked at that location, sir?

A. It's been several weeks.

Q. Where is it that Koll is located in that area, if you know?

A. The applications currently pending before the City of Renton are north of that site.

Q. North of that site? Do you know how much the acreage is on that one site there?

A. Not precisely, no, I don't.

Q. Is there a flood plain located in that area?

A. In that general vicinity, yes, there is.

Q. Isn't there a requirement that someone who builds there sign a waiver releasing the City of any liability?

A. That is correct.

Q. So that at any time, it could flood and any existing building there would have to bear the responsibility or the owner would have to bear the responsibility for the damage, the City could not be called upon; is that correct?

MR. WARREN: I'm going to object. That asks for legal conclusion from the planning director [12] that I don't think he's competent to make.

THE COURT: Overruled.

THE WITNESS: There is a requirement for a waiver to be signed for any use, regardless of the type of use.

Q. (By Mr. Smith) There was at one time a moratorium, was there not, until probably the last nine months on new building in that area?

MR. WARREN: I object, your Honor. It's irrelevant. If there was a moratorium at one time, it doesn't bear on the case now.

THE COURT: Overruled.

Q. (By Mr. Smith) If you know, sir?

A. I believe that there was a moratorium. I'm not certain that that property in particular was affected.

Q. Do you know when the flood plain plan was adopted by the City?

A. I believe that it was adopted in the spring of 1981.

MR. SMITH: I'd like to have this marked as Exhibit 2, please, Plaintiffs' Exhibit 2. This is the ordinance for the adoption of the flood plain and the waiver form.

THE CLERK: It will be marked as Exhibit 2.

(Plaintiffs' Exhibit No. 2 was marked for identification.)

[13] THE COURT: It's already in the record, isn't it? Is this the ordinance itself?

MR. SMITH: Yes. I'm showing the date, your Honor. The hearing was October of '81. It does conflict with spring. I'm just trying to have all the facts in there. This is the flood plain ordinance.

THE COURT: Excuse me.

MR. SMITH: And the waiver form, your Honor, that has to be signed.

(Document handed to the witness.)

MR. WARREN: Your Honor, I don't wish to keep objecting, only I don't understand where we're going with this. Because the Court said that he would be permitted to have live testimony of Mr. Clemens with respect to his affidavit. His affidavit doesn't mention flood plains. It doesn't mention the uses to which individual parcels would be put.

THE COURT: His affidavit says there are 400 acres available for the use that would be permitted by this ordinance, that would permit an adult theatre to operate.

MR. WARREN: That's correct.

THE COURT: All right. I think that this [14] examination and this testimony is relevant to that conclusion.

MR. WARREN: Thank you, your Honor.

THE WITNESS: I'm familiar with this document.

Q. (By Mr. Smith) Would you indicate—you said earlier you thought it was the spring of '81?

A. There are two sets of regulations which would apply. And I believe correctly the City's flood hazard regulations were adopted in May of 1981. This is a separate requirement of the City that was adopted at a later date.

Q. And that is the requirement for the signing of the, the execution of the waiver?

A. Yes. According to Section 2, that's correct.

Q. Would that apply to the area covered by that which you designed here as area C?

A. Yes, it would.

Q. Now, taking area D you have designated here, would you tell us where that's located?

A. It is generally located in the vicinity of the Longacres Racetrack.

Q. When you say generally in the vicinity, isn't it in the middle of the Longacres Racetrack?

A. Yes. Much of it is.

[15] Q. Well, how much of it is not in the contiguous area of Longacres Racetrack?

A. I believe about a third of it would be outside of the racetrack area itself.

Q. When was the last time you checked?

A. I reviewed the air photograph of that area this morning.

Q. All right. Is there parking around the racetrack?

A. Yes, there is.

MR. SMITH: With the Court's permission, may the witness show us where the parking would occur around the racetrack?

THE COURT: He may.

THE WITNESS: Your Honor, the racetrack is illustrated within this drawing. There is parking on the north, on the west and in areas in the south.

Q. (By Mr. Smith) So are you saying that the area that's marked G here is part of the racetrack parking area?

THE COURT: I thought we were talking about D. He marked it as D.

MR. SMITH: Your Honor, I'm talking about where it has G printed on the map.

THE COURT: Well, let's not confuse the record, Counsel. He's made a mark that is his mark and marked that, I believe, as—did you mark it as [16] area D?

THE WITNESS: That's correct.

THE COURT: Let's talk about it as area D. Otherwise, nobody's going to understand what's going on.

Q. (By Mr. Smith) Now, in the area south of the racetrack or at least below the racetrack, there is seemingly an open area. Isn't that in fact parking for the racetrack?

A. It is utilized as parking at some times.

Q. For the racetrack?

A. Yes.

Q. Is it owned by the racetrack people?

A. I do not know for sure.

Q. You didn't check that before you came in?

A. No, sir, I did not.

Q. Is any of that developed other than for parking for the racetrack?

A. Ao, not to the best of my knowledge.

Q. Now taking the area that you have designated as area E, could you tell the Court what's located in the area marked area E?

A. There are two industrial uses or groups of industrial uses, one located generally in this vicinity and one located west of the railroad tracks [17] which were illustrated here.

Q. All right. And one of them is the Benearoya Industrial Park; is that correct?

A. That's correct.

Q. And how much of that area that's reflected here, do you know how many acres this would be, the area E?

A. No sir. Not precisely. I could guess that it's probably in excess of 100 acres.

Q. Now, is there a drainage ditch in there that is designated as a possible nature trail on your comprehensive planning?

A. The comprehensive plan identifies the Springbrook Creek as a green belt.

Q. Would you point that out, please, where that would be?

A. Approximately in this area.

Q. Now, you're indicating an area that cuts across and bisects the bottom right-hand side. Now, under your ordinance, as you understand it to be, wouldn't the green belt area be considered a park?

A. It is not currently existing.

Q. No. But it is designated that's where you're putting it; is that not correct, sir?

A. At the present time, the City has no plans for development of that area for park purposes.

[18] Q. All right. Is that flood plain area, also?

A. It's all within the disclaimer area.

Q. So that means that someone would have to sign and agree that they would not sue the City, so to speak, for damages as a result of the flood plain?

A. That's correct.

Q. Now, is there a school immediately outside of the limits which would be within one mile of that area?

A. There is a school which is currently vacant and boarded up within that vicinity, that is correct.

Q. And that school is located where?

A. Approximately at this location.

Q. Where would one mile from there be in terms of this area?

A. Would cover the majority of that area.

Q. Cover the majority of that area? And the flood plain would cover the entire area, would it not?

A. Yes, it does.

Q. But yet there are two areas that are business parks being developed; is that correct?

A. They are existing.

Q. Yes. And are they in the flood plain?

A. Yes, they are.

Q. They preexisted the flood plain ordinance?

A. That is correct.

[19] MR. SMITH: Excuse me, your Honor.

(Brief pause.)

MR. SMITH: Your Honor, I would like to mark for identification the Renton Urban Area Comprehensive Plan, revised as of January, 1980, which would show the green belt area running through that part of the map which indicates area E.

THE COURT: Would you have it marked?

THE CLERK: It is marked as Plaintiffs' Exhibit No. 3.

(Plaintiffs' Exhibit No. 3 marked for identification.)

MR. SMITH: And I have, your Honor, asked as the next exhibit to be marked is the area service by the notice of disclaimer for flood damage, which encompasses the area marked, designated D and the area that's designated E and the area designated C.

THE CLERK: It is marked as Plaintiffs' Exhibit No. 4.

(Plaintiffs' Exhibit No. 4 marked for identification.)

THE COURT: I don't believe that you've moved the admission of any of these yet.

MR. SMITH: No, sir, I haven't.

[20] THE COURT: Gentlemen?

(Document shown to counsel.)

MR. SMITH: I'd like to have this marked as the next exhibit, please.

THE CLERK: Exhibit No. 5, it is marked.

(Plaintiffs' Exhibit No. 5 marked for identification.)

Q. (By Mr. Smith) Mr. Clemens, can you see this map?

A. Yes, I can.

Q. Do you see the area where the racetrack is located?

A. Yes, I do.

Q. Does this refresh your recollection about where the parking facilities are paved?

A. Yes.

Q. What area near the racetrack would be usable in the area D for an adult theatre?

A. If you will note from my affidavit, I state that there are areas where the regulations do not apply. That is the only statement that I made.

Q. Well, what areas are there that the regulations do not apply?

A. The areas in green.

Q. Is there any area in area D that is not encompassed by the parking lot where adult use could be placed?

A. The unpaved parking area that's south of the line of [21] trees, which you can see on this photograph.

Q. Are you talking about the area over here?

A. No, sir. South of the line of trees.

Q. Talking about right along here?

A. It might be easier—

Q. If you would put a mark on there, please, sir?

THE COURT: First of all, I'm not sure anybody's really identified that and indicated what it is and what it depicts and whether they are familiar with it.

MR. SMITH: I will.

Q. Mr. Clemens, do you recognize the topography of the areas that's presented by this map?

A. Yes, I do.

Q. Have you ever seen a map like this before?

A. Similar to that.

Q. And you're familiar with the terrain and what exists in and around the community of Renton sufficiently to acquaint yourself with this being an accurate depiction thereof?

A. Yes.

Q. And the area that you have designated is south of the track as an area where adult theatre use could be placed; is that correct?

A. It is an area where the adult theatre limitation [22] regulations would not apply.

Q. Would not apply? Now, is there a railroad track abutting that particular area?

A. Yes. To the west.

Q. When you say to the west, isn't that south of the area you've designated?

A. No. You're holding the photograph 90 degrees off is the problem.

Q. Is this more correct

A. No. It's upside down now.

Q. Now, the area that you designated as the place where an adult use theatre could be located is right there; is that correct?

A. No, sir.

Q. Talking about down here?

A. That's correct.

Q. Where is the railroad track located?

A. To the west.

Q. Where is there a road leading into here, a paved road?

A. Both on the west underneath the railroad tracks and from the north off of Southwest 16th Street.

Q. Now, the area that is indicated for the ultimate green belt is located where, sir?

A. The area designated as a green belt would follow the [23] Springbrook Creek in its current alignment or at such time as the ultimate drainage facilities of the valley are constructed. The green belt would follow wherever those facilities went.

Q. So that with the master plan of the green belt set forth in your comprehensive master plan, then, this would in essence be a park at the time that finally occurred; is that not correct?

A. No, sir. I have no knowledge that that would be the case. The City of Renton does not own the right-of-way at the present time, has no plans to construct any park or recreational facilities.

Q. Now, in the area that's been designated as area E on your map, are there railroad tracks through there?

A. Yes, sir, there are.

Q. Do they have access crossing the railroad tracks at that particular area?

A. There are a number of railroad tracks, some of them are crossed and others are not.

Q. Down at the bottom in the area where I'm pointing appears to be railroad tracks; is that correct?

A. That is correct.

Q. How many different tracks would you say are along there?

[24] A. That's not in the City of Renton.

Q. That's not in the City of Renton?

A. No, sir, it's not.

Q. So immediately above that, the railroad tracks are in the City of Renton?

A. No, sir, they are not.

Q. None of those are in the City of Renton?

A. Not till you get to Southwest 43rd, and you did not point to that area.

Q. I understand. Is there an access across these railroad tracks into the backway of this area that you've designated as E?

A. If you're speaking about area E, it's not the area that you were pointing to on the aerial photograph.

Q. Area D; is that correct?

A. Pardon me?

Q. Is that area D?

A. No, sir, it's not.

Q. All right.

May I have a moment, your Honor?

(Brief pause.)

Q. (By Mr. Smith) Sir, on this map, in this area that I'm pointing to, which area is that on the map over here that we have?

A. It would be just to the east of area E.

[25] Q. Would it be inclusive of area E, any part of it?

A. The very fringe.

Q. Aren't there two cul de sacs that very recently have been placed in there?

A. That is correct.

Q. And railroad track spurs that have gone across there?

A. Yes, there are.

Q. And that's in area E?

A. That's correct.

THE COURT: Is it or isn't it in area E? It is in area E what he's just pointed to? I thought I heard you say that it was outside area E. It is part of area E?

THE WITNESS: The area which you just pointed to is within area E and there were cul de sacs.

Q. (By Mr. Smith) New cul de sacs placed?

A. That's correct.

Q. And railroad track spurs; is that correct?

A. That is correct.

Q. Do you, sir, know whether any minutes were kept of any meetings by the City of Renton governmental officials on the so-called adverse effects of an adult entertainment land use?

A. By minutes, do you mean notes that were made by either our office or the City Attorney's Office or [26] are you speaking of formal minutes?

Q. Public record by the Secretary of the Council, the City Council or such?

A. Not to the best of my knowledge.

Q. You've said several times in your affidavit, you've used the term "adverse effect of adult theatre uses." What is it you meant by the adverse effect of adult theatre uses that the City considered?

A. The effects that were discussed by the people that spoke were generally construed, the comment was consistent throughout most of the testimony that there was a grave concern about the effects of this type of activity upon persons or individuals in the general vicinity of those uses.

Q. What were the adverse effects that were discussed?

A. I cannot state it any different than I have just stated it, sir.

Q. Well, was there a differentiation between adverse effects of adult theatre uses and adverse effects of adult bookstore uses?

A. I believe that the majority of the speakers spoke to both issues in essentially the same light.

Q. What evidence, if any, was taken from any planners or real estate people as to how the adult theatre use would affect the economic health of the City?

[27] A. * The fire department reviewed documents from the City of Seattle which had recently passed a legislation dealing with this type of activity and the committee of the Council was made aware of the discussions that were presented in the City of Seattle.

Q. Was there any testimony by any professional as to the economic adverse effects of the adult theatre use in the City of Renton?

A. Yes, sir. By the Chamber of Commerce President.

Q. Whose name was that?

A. Kay Johnson.

Q. And Kay Johnson is what kind of professional?

A. I don't know what his professional background is. He is the manager of the City—of the Greater Renton Chamber of Commerce.

Q. Is he a real estate broker?

A. I do not know, sir.

Q. Was there any analysis of land values, property values?

A. None that was done by our office.

Q. Well, what by your office other than getting what Seattle may have done, what evidence did you gather and present on the question of the adverse use effect on the economic health of the citizens?

A. The statement of the citizens of the City of Renton [28] as a part of the public meeting on this subject.

* Counsel for both parties agree that the words "The fire" should read "Our."

Q. And that's the extent of it?

A. Yes, sir.

Q. Now, how about the adverse effect on the business welfare of the citizens? What professional testimony did you present or gather to support that conclusion?

A. One of the statements of the citizens who spoke at the public meeting.

Q. Who were opposed to an adult theatre; is that correct?

A. I can't speak to that specifically.

Q. You were there, weren't you?

A. Yes, I was.

Q. Did they talk about adult theatre uses?

A. Yes, they did.

Q. They talked about the use of the theatre because of the content of the material; isn't that true?

A. I'm not sure that I can speak specifically to that.

Q. Well, was it somebody from the school, some one of the principals of the school that came in and talked about children having to be exposed to adult theatres if they walked within a mile of the school?

A. Yes. The superintendent of the schools spoke to that issue.

Q. Now, he was talking about the content of the material [29] offered by the theatres?

A. I don't know what was in his mind when he was making his statement.

Q. All right. Now, how about the vitality? What evidence did you present and gather to the City Council as to protecting the vitality of the City of Renton from the adverse effects of adult theatre uses?

A. The testimony of the citizens of Renton at the public meeting.

Q. Any professional testimony of any experts?

A. None that I recall.

Q. All right. Now, what is it that you meant by the word "vitality"?

A. Economic health, I believe.

Q. But you talked about economic health and you talked about vitality and welfare as though they are separate categories. Are you saying now they are but one category?

A. If you could refresh my memory as to where that's located?

Q. On Page 6, sir, Line 27.

A. I believe all three times vitality, economic health and business welfare all speak to the same general issue of economic acceptability.

Q. So the justification is the economic health of the [30] City of Renton?

MR. WARREN: Objection, your Honor. Whose justification for what are we talking about? Is he asking him to speculate as to what the City Council did?

MR. SMITH: The justification set forth in his affidavit.

THE COURT: In his affidavit. He's asking him what he means by the words he used. I think that's certainly proper.

THE WITNESS: The two issues that I recall that the Council was concerned about was the economic health of the businesses within the City of Renton and concerns about the protection of residential neighborhoods of the City of Renton from potential adverse effects of adult entertainment.

Q (By Mr. Smith) What are the potential adverse effects of adult entertainment that you presented and had considered at the meeting?

A. The discussion—if I might?

Q. Yes, sir.

(Brief pause.)

A. The testimony presented to the committee, as noted on Page 3, beginning about Line 27, testimony presented to the committee consistently noted adverse impact [31] upon neighborhoods and businesses within the City of Renton from those types—types of activities that would include adult theatres.

Q. As of that day—that was in March of 1981, correct?

A. That is correct.

Q. Was there an adult theatre in the City of Renton?

A. Not to the best of my knowledge, sir.

Q. Then what evidence did you present from professionals as to what the adverse impact was on neighborhoods and businesses from adult theatre use?

A. Other than our analysis of other jurisdictions' findings and conclusions, there was none.

Q. Now, you analyzed Seattle; is that correct?

A. That's correct.

Q. How many months of hearings did they have in Seattle, if you know?

A. I don't know, but it was extensive.

Q. Did you review all of that or have your staff review all of that?

A. We reviewed the major conclusions and not the detailed background.

Q. So you reviewed the conclusions, but you did not review the factual basis on which the conclusions were based; is that what you're saying?

A. I'm not sure that I fully understand the question.

[32] Q. Well, you said you didn't review the whole thing, you reviewed the conclusions, correct?

A. That is correct.

Q. By that do you mean the summary of what they found to be and their recommendations?

A. That is correct.

Q. Did you read the facts upon which they based their summary?

A. Not every fact, no, sir.

Q. Did you read any of the facts or did you just read the conclusions?

A. We read the summary of their findings and conclusions.

Q. The summary of their findings and conclusions?

A. That's correct.

Q. Did you go back to the original source documents to see what the adverse impact, if any, would be?

A. No, sir, we did not.

Q. Then how were you able to give that information to the City Council of Renton of what the factual basis was?

A. We could only give them what we reviewed, and that was a summary of the findings of the City of Seattle and their conclusions.

Q. What other geographic area besides Seattle? You [33] said there were other jurisdictions whose studies that you reviewed. What other ones?

A. We reviewed the Court's findings in the case of Young versus the City of Detroit. I believe that's the case.

Q. What other findings did you review from other geographical areas?

A. No findings.

Q. None?

A. None.

Q. Now, you indicated on Page 3 at Lines 8 through 10, you talked about the fact that, "The Council consider comments from the land use planning professionals in my office . . ." do you see that part there, sir?

A. Yes.

Q. What comments were made—I mean, what land use planning professionals in your office made comments?

A. Myself.

Q. So when you phrased this, you mean you're the one that made the comments?

A. That's correct.

Q. And you looked at the summary of the conclusions in the City of Seattle and Young versus American Mini Theaters; is that correct?

[34] A. Correct.

Q. And so you were the land use planning professional that made the comment to the Council?

A. That's correct.

Q. Anybody else who was a professional make a comment on that aspect of land use planning?

A. None that were land use professionals.

Q. All right. So as the land use planning professional who reviewed the summary of the City of Seattle, what are the adverse impacts that you identified and presented to the City Council in your position as acting planning director?

A. The areas of concern that were drawn from the City of Seattle was the potential for adverse effects upon the moral character of young people within the area, that there was the potential for secondary impact of other related both potential criminal activity and activities of that type, and the potential adverse impact on property values in the immediate vicinity of those types of uses.

Q. The City of Seattle has a Skid Row area, does it not?

A. Yes. I believe that's—

Q. And the adult use zoning area is primarily within that Skid Row district, is it not?

[35] A. It is now.

Q. Yes. I'm saying it is now, correct?

A. Correct.

Q. And the bars and other Skid Row appurtenances are already there, are they not?

A. Yes, sir. If I might?

Q. Yes.

A. The discussion related to eliminating adult entertainment uses from areas outside of that area and the potential spinoff effects that would be similar to the Skid Row impacts if those uses were allowed to remain outside of that area.

Q. All right. Now, what are the collateral criminal activities that you indicate could occur by having an adult theatre?

A. Prostitution.

Q. What else?

A. Potentially assault, activities of that type.

Q. Prostitution could be punished as a crime, can it not?

A. Yes, it can.

Q. Can assault be punished as a crime?

A. Yes, it can.

Q. Were there any other facts other than protecting, I think you said, the moral fiber of young people? Is that what you said?

[36] A. Yes.

Q. And the depreciation in real property values?

A. Yes.

Q. And you have no independent factual evidence, do you, sir?

A. No, sir.

Q. Of what that impact would be, do you?

A. No, sir.

Q. Was there not an equal concern on your part as the City Planning Director commenting to the City Council that adult bookstores, peepshow operations could have the same impact?

A. I believe the regulations speak only to motion picture theatres and those, I believe, by definition in the Code would include a peepshow type of activity. Does not include adult bookstores.

Q. Is there any difference as you perceived it from your review of the summary of conclusions between the—strike that. Did you not study and would you look at Page 5, Line 27 and 28 of your affidavit? Did you not have a study of the location of adult entertainment land uses as a whole?

A. Yes. All were discussed.

Q. What was the reason, if you know, in your recommendations that nothing was done about adult [37] bookstores and adult theatres were singled out?

A. I do not recall at this time why it was segregated to just that one activity.

Q. Is the zoning predicated on the content of the material being offered?

A. I would presume that that is correct, based upon the definition.

MR. SMITH: Thank you, no further questions.

Your Honor, if I may at this time, I would move into evidence all of the exhibits which have previously been identified and marked as Plaintiffs' Exhibits 1 through 5 inclusive.

MR. WARREN: I have no objection, your Honor, except I don't think 4 and 5 have been identified.

THE COURT: I don't believe the photograph has been identified certainly. Which one is that?

THE CLERK: 4.

MR. SMITH: I think that was identified, your Honor.

THE COURT: Is that 4 or 5?

THE CLERK: It's 5.

MR. WARREN: I understood that to be 3, your Honor.

[38] THE COURT: Let's review what they are. This is 1. That will be admitted. 1 is going to be admitted. What was 2?

MR. WARREN: 2 was the ordinance on the flood plain, I believe.

THE COURT: Any objection to 2?

MR. WARREN: No.

THE COURT: 2 will be admitted. 3 is the comprehensive plan.

MR. WARREN: I don't think that was identified, but we have no objection to the document.

THE COURT: It was. 3 will be admitted. 4 is?

MR. SMITH: The flood plain, your Honor.

THE COURT: Yes. That was identified by the witness. Do you have any objection?

MR. WARREN: Okay.

THE COURT: 4 will be admitted. 5 is the photograph. Do you have an objection to that?

MR. WARREN: No, your Honor.

THE COURT: 5 will be admitted.

(Plaintiffs' Exhibits 1 through 5, inclusive, were admitted.)

MR. SMITH: Thank you, your Honor.

[39] CROSS-EXAMINATION

BY MR. WARREN:

Q. Mr. Clemens, could you focus in, please, on the flood plain ordinance and the exhibit dealing with the area to be covered by the flood plain moratorium? Initially, does the ordinance in any fashion bar development within the flood plain area?

A. No, sir, it does not.

Q. Can you relate to the Court the background that led up to the adoption by the City Council of that flood plain disclaimer ordinance and the area?

A. The Federal Emergency Management Administration is charged with the requirement by Federal statute to develop flood plain areas for flood insurance purposes. Their study was completed in the spring of 1981, I believe, or it could have been late fall of 1980. I'm not precisely sure of the date. Approximately midsummer of 1981, the City was made aware of the potential for some very erroneous conclusions that that study drew. After a discussion with the Federal Emergency Management Agency and their consultants, it was concluded that the findings of the initial study were incorrect and that the potential for flood hazard within the entire valley area was—the possibility was there [40] for substantially greater flood hazard than had been identified in the original documentation.

Q. To date, has the City or the Federal government developed exact figures as to where the flood hazard line should be located?

A. No, sir. Those are still under preparation by consultants for the FEMA people.

Q. Now, if I could, Mr. Clemens, pointing to the large map, which I think will be easier to refer to, is it

not true that the general area of the flood plain covers all of this area?

A. That's correct.

Q. Okay. And are there existing commercial developments in that area?

A. Yes, there are.

Q. Are there many?

A. Both at the north and south, there are extensive commercial developments.

Q. Could you describe to the Court the type of development that's in the Benaroya area?

A. There are industrial buildings covering approximately three million square feet of gross floor area. West of the Benaroya development along the West Valley Road, which would be the western perimeter of the area marked in black on Exhibit No. 1, are [41] various types of industrial uses. Going north, as already has been spoken to, is the Longacres Horseracing Track, and its accessory uses, which includes restaurants and other types of activities. Along both the northside and southside of Interstate 405, which extends east and west between areas B and C and the area D, which would be below it, are a variety of industrial and commercial activities ranging in size from relatively small to up to 200,000 square feet of gross floor area.

Q. Mr. Clemens, to the best of your knowledge, are the areas that are developed presently occupied by the owners or tenants thereon?

A. Yes, sir. Most of them are. There may be some vacancies, but the majority are occupied.

Q. Do you know whether the Benaroya complex is fully rented?

A. I don't know specifically. But I would believe that it's fully occupied.

Q. Now, Mr. Clemens, is there anything in the ordinance, this particular ordinance that's being challenged, or any City ordinances that would ban an adult entertainment theatre from occupancy in the Benaroya Park?

A. None that I'm aware of, sir.

[42] Q. How about in any of the other developments that are included in the green areas on your map? Is there anything that you know of in our ordinances that would ban the use or occupancy of one of those areas?

A. No, sir. I'm not aware of any.

Q. Mr. Clemens, this notice of disclaimer that has been admitted, the map, is the intent, to the best of your knowledge, that this be a permanent document?

A. No, sir, it is not. The intent of that document is to act as an interim regulation until such time as the revised FEMA analysis of the flood hazard has been developed, at which time the disclaimer would no longer be applicable and the City's flood hazard regulations established in the early part of 1981 would apply.

Q. Now, focusing in again on the discussion that was in area—

THE COURT: May I ask a question?

MR. WARREN: Excuse me, yes.

THE COURT: Mr. Clemens, the flood plain area that you were talking about that's been identified, does that include both D and E?

THE WITNESS: Yes, sir, it does.

THE COURT: Does it include B and C, also? [43] Does it go that far?

THE WITNESS: It does include C. I believe area B is not included because it is higher than the surrounding areas.

THE COURT: But the other areas would all be included in that?

THE WITNESS: With the exception of A.

THE COURT: With the exception of A, yes. All right.

Q. (By Mr. Warren) Mr. Clemens, is it possible for someone to come into the City, one of those areas that's included and fill the property?

A. Yes, it is.

Q. And possibly take it outside of the floodway fringe?

A. Yes, sir, it is.

Q. Directing your attention to the area that's been marked area E, and there was some discussion previously about cul de sac roads in this area. Are these or recent origin?

A. Yes, sir, they are.

Q. Why were the cul de sac roads put in here, to the best of your knowledge?

A. To provide for further development of that area for various kinds of industrial and commercial uses.

Q. So these are access roads, then, to the site; is that [44] right?

A. That is correct.

Q. How about the railroad spurs that are in this location? Are they of recent origin?

A. Yes, sir, they are.

Q. Are they capable of being crossed?

A. At the present time, some of them cannot. There are platted streets which extend beyond all of those railroad spurs, which when the roads are completed would be available to access across the railroad tracks.

Q. If someone desired to develop a property, they could then bring a road to the grade of the railroad spurs?

A. That is correct.

THE COURT: A followup on my question with respect to the areas included in the flood plain, the areas that are not marked in green on the map, areas C, D and E. There are substantial areas just outside of those that are also included in the flood plain?

THE WITNESS: Yes, sir.

THE COURT: That are developed with the commercial and industrial uses?

THE WITNESS: Can I illustrate that, your [45] Honor?

THE COURT: Yes.

THE WITNESS: Speaking to Exhibit No. 5, if I might place this in close proximity. This is the Interstate 405 Freeway and that is located at this location on the other map. This is the Valley Freeway and, again, that's located here on this map. So you have some feel for the general location.

The Longacres Racetrack is here. It sits here approximately on this photograph. The areas at the south end of our City Limits—

THE COURT: Well, I can see. What is that? That's the big interchange up there and that's the areas that's on the map there.

THE WITNESS: Right, that's correct. If you will refresh me with the question again?

THE COURT: I was curious to know of areas within that same flood plain, outside of the areas that we've talked about, specifically that would permit the use that we're talking about here that are presently commercially and/or industrially developed.

THE WITNESS: That are developed and within the flood plain?

THE COURT: Yes.

THE WITNESS: And within—

[46] THE COURT: No. Not within the area that we're talking about. Most of that, I think, we've talked about that already. But I'm just interested in knowing of the development that is presently there that's there in spite of the fact that it's in a flood plain.

THE WITNESS: Okay. The largest, of course, is the Benaroya Complex here at the extreme south.

THE COURT: Well, now, that was within our area, is it not?

THE WITNESS: That's correct. Adjacent to that is the Koll Business Park located in the vicinity.

THE COURT: But that's in our vicinity, is it not?

THE WITNESS: It's not within—portions of it may fall within it.

THE COURT: It's partially in and partially out is what you're saying?

THE WITNESS: Right. There are warehouses in this general area, as you can see from the photographs. A tank farm, mini storage warehouses, large office industrial complexes and several additional warehouses and industrial complexes.

THE COURT: Generally on that photograph, indicate for me the flood plain areas.

[47] THE WITNESS: The flood plain area extends from the Green River on the west, which you can see quite distinctly outlined, and actually the bottom of the hill which is east of the freeway, but generally speaking from the freeway to the river and northerly actually off of this photograph.

THE COURT: Goes even substantially farther?

THE WITNESS: That's correct. As it relates to this map, would extend from here all the way to those railroad tracks. This photograph cuts off at approximately this location.

THE COURT: All right, thank you.

Q. (By Mr. Warren) If I could follow up on that, Mr. Clemens. Are there any plans for development to the north of the Interstate 405 in that floodway area?

A. Yes, sir, there are.

Q. And what types?

A. A variety of office and industrial uses.

Q. Are they small developments or large in scope?

A. The Koll Development, which was spoken to earlier, the entire development is quite large if you consider in excess of a hundred acres total development as being large.

Q. And the other uses that are planned to the north there in the flood area?

[48] A. At the north, there are a variety of relatively smaller uses that might be two to five acres, possibly as much as ten acres in size that are under consideration.

Q. Now, you previously mentioned the Metro Sewer Waste System Facility. Is this in the floodway area here?

A. The treatment plant itself is outside of the floodway area. There is a berm around the facility to protect

it from flooding so that it will continue to operate even in a flood.

THE COURT: That's area C, is it?

THE WITNESS: B, your Honor.

MR. WARREN: That's all the questions I have, your Honor.

MR. SMITH: Very briefly, your Honor, if I may?

THE COURT: I have a few more myself.

MR. SMITH: I'm sorry.

THE COURT: With respect to area B, it is my understanding that approximately three-quarters of that area is presently taken up with the sewage treatment plant?

THE WITNESS: That is correct.

THE COURT: An approximation.

THE WITNESS: Approximation.

[49] THE COURT: One-quarter of it is presently vacant property developable; is that correct?

THE WITNESS: Yes, that's correct.

THE COURT: I thought there was mention of a third use in that area.

THE WITNESS: There's existing railroad—partially abandoned and partially existing railroad spurs in that vicinity.

THE COURT: All right. A itself, is that all Boeing property?

THE WITNESS: To the best of my knowledge, it's all within their complex.

THE COURT: As a practical matter, not developable?

THE WITNESS: For an alternate use at this time, it would be difficult, I would think.

THE COURT: Approximately one-third of D would be outside the racetrack property itself; is that correct?

THE WITNESS: The property may be in the ownership of the racetrack, but it's an area which is only used on the rarest of occasions for overflow parking.

THE COURT: The entire area, the entirety of area D is either used as part of the racetrack [50] facility itself or alternatively, for overflow parking?

THE WITNESS: It has been used for overflow parking.

THE COURT: Is the entirety of that area in one ownership?

THE WITNESS: I can't tell you for sure.

THE COURT: All right. Thank you.

MR. SMITH: May I?

REDIRECT EXAMINATION

BY MR. SMITH:

Q. Sir, you indicated the flood plain and you pointed generally to the left-hand bottom corner of the map. Isn't there a substantial amount of marshland in one of these areas that's owned by the City?

A. No, sir. It's outside of all of the areas that are shown in green.

Q. The judge before asked you about were there areas within the flood plain other than those marked and identified in green. You indicated there were such areas; is that correct?

A. Yes, that's correct.

Q. As part of that area that's outside the green is marshland that is owned by the City; is that correct?

A. That's correct.

[51] Q. Now, you were asked by counsel about in the flood plain if someone could build up or fill in land, put up a building; is that correct?

A. That's correct.

Q. What would they do with regard to roads? Would roads also have to be built up?

A. Yes, sir.

Q. Who would bear the responsibility financially of building up the roads?

A. The proposed developer would be responsible for access to his site.

Q. Is that if Playtime Theatres wants to put an adult theatre in the flood plain, they would have to build up the

site and then arrange to pay for the cost of the road going in; is that correct?

A. Unless the roadway was already there.

Q. All right.

A. It would be—

Q. If it were there, would it not have to be built up under the new ordinance?

A. If it's an existing roadway, there would be no additional requirement.

Q. You indicated that when the cul de sacs were completed, that an adult theatre use could be put in there; is that correct?

[52] A. That's correct.

Q. When is it going to be completed?

A. Burlington Northern Railroad Company owns the largest share, particularly of area E. They are currently under bond to the City of Renton to complete those roadways within the time limits of our ordinance, which would be within the next one to two years, I believe.

Q. So the Burlington Northern owns the greater part of the property in that designated area E?

A. In area E.

Q. All right. And what is that to be used for under the comprehensive plan?

A. The comprehensive plan indicates the area as potentially—if I might, your Honor? I would like to be precise. Exhibit 4, I believe.

MR. SMITH: I have an extra copy.

THE COURT: The Clerk will provide him with Exhibit 4.

(Document handed to witness.)

THE WITNESS: I'm sorry. Exhibit 3, the colored map.

(Document handed to witness.)

THE WITNESS: Thank you. The area is designated on the comprehensive plan as being [53] potentially appropriate for manufacturing park use.

Q. (By Mr. Smith) All right. And that covers the entire area, does it not, sir, of E and D; is that correct?

A. No, sir. Area D, according to our comprehensive plan, is designated as a recreational area.

Q. That's because it is a racetrack; is that correct?

A. I was not present when it occurred. I would assume that's the case.

Q. As it is designated on this revised edition of January, 1980, does it not include for that recreation area the entire parking lot that's used an overflow; is that not correct?

A. I believe that's the case.

Q. If the entire area other than the racetrack and the parking area is zoned as a manufacturing park, and most of that is under contract, you say under bond with Burlington?

A. Burlington Northern.

Q. Is there any possibility that an adult theatre could be placed there today?

A. At this time, yes, sir.

Q. Yes? When they are under contract with rail spurs and cul de sacs and everything else that's being done there?

[54] A. As far as the zoning of the City of Renton is concerned, an adult theatre would be allowable use within the areas designated industrial park.

Q. Sir, would you look at that and is there a designation on there where you would find the waste disposal plant?

A. Yes, sir.

Q. Is there any part of area B that is not within the waste disposal plant set forth in the comprehensive plan?

A. Yes, sir. There are parts—

Q. Would you show us where that is, based on this map?

A. The southerly, the very southerly-most portion of that is designated as a manufacturing park on the comprehensive plan.

Q. Well, there's a road going through here. Have you found that on the map that you have in front of you?

A. Yes, I have.

Q. And the area that is designated as B is north of that road?

A. That's correct.

Q. Correct? And you identified this sort of indentation on your map there?

A. Yes, I do.

Q. Now, are you talking about the heavy manufacturing [55] section that would appear to be at the bottom part of area B? Is that—

A. No. That's manufacturing park, sir, according to the plan designation.

Q. What's the black location there?

A. There is no—there's not a black designation. That's a quasi public designation indicating the treatment plant itself.

Q. The treatment plant? So what part of this area is the treatment plant, based upon observing the map that you have here, the comprehensive plan?

A. The southerly portion of that is outside of the treatment plant, and, according to this comprehensive plan, it would be designated as a manufacturing park.

Q. And there's a railroad junction here, is there not?

A. No, sir. It doesn't exist any longer.

MR. SMITH: I have no further questions, your Honor.

RECROSS-EXAMINATION

BY MR. WARREN:

Q. Very briefly, Mr. Clemens, since counsel has brought into question the roads. Can you explain to the court the present roadway that exists on the south end [56] of the City limits? How many lanes of traffic does that support now?

A. Currently two.

Q. Are there plans for more?

A. The City is currently under contract to widen that street to five lanes.

Q. The circulation roadway in the industrial area down here, can you explain to the Court the number of lanes on Lind Avenue?

A. There are four moving lanes with turning lanes at the street intersections.

Q. How does that run throughout that industrial area?

A. North—it runs north-south all the way from the south edge of the map northerly into the central portion of the City beyond 405.

Q. Are there any plans to develop any other roads in this area that you're familiar with?

A. Yes, sir. The City has authorized local improvement District No. 314, which will provide a number of improvements to existing streets plus extend in particular Southwest 27th Street, which will enter the southerly end of the Longacres Racetrack. That would be the southerly edge of area D.

Q. This area?

A. That's correct.

[57] Q. Do you know the number of lanes that are planned for Southwest 27th?

A. I believe it's four moving lanes.

MR. WARREN: That's all the questions I have.

FURTHER REDIRECT EXAMINATION

BY MR. SMITH:

Q. Those plans will ripen into fruition for the extension of two to five lanes when, sir?

A. We're under contract now. The construction would commence as soon as the weather is permitting.

Q. How long is it expected to take to complete?

A. Just guessing—I'm not an engineer—but I would assume between a year and 18 months.

Q. And the other roads that you indicated were going to be built there, are they under contract?

A. No, sir, they are not.

Q. When will they be built, if you know?

A. Again, the LID 314 improvements are expected to commence sometime this year and would take, again, about the same period of time.

MR. SMITH: Thank you.

MR. WARREN: No further questions, your Honor.

[58] THE COURT: The area that is in E, despite all the plans to widen roads and put in other roads right now, there is an industrial park in existence there, is there not?

THE WITNESS: On a portion of it, that is correct.

THE COURT: And there are roads permitting access to and from that area?

THE WITNESS: That is correct.

THE COURT: Thank you. That's all I have. Anything further from this witness?

MR. SMITH: No, sir.

* * * *

[EXHIBIT 2]

RESOLUTION NO. 2421

WHEREAS, the City of Renton has been informed by the Federal Emergency Management Agency that its computation of the 100 year flood level may be incorrect, and

WHEREAS, there is no presently reliable date with which to calculate the actual elevation of the 100 year flood, and

WHEREAS, it is necesasry and advisable and in the public interest to notify permittees of the City of Renton whose construction permits may lie within the Green River Industrial Area of such lack of reliable data,

NOW THEREFORE, the City Council of the City of Renton do resolve as follows:

SECTION I. The above recitals are found to be true in all respects.

SECTION II. That the administration of the City of Renton is directed to issue a Notice of Disclaimer and to obtain an acknowledgment of such Notice for each applicant who is issued a building, construction or use permit within the Green River Industrial Area in the form as attached hereto as Attachment "A".

SECTION III. That the City Council of the City of Renton hold a public meeting on October 26, 1981, at 8:00 P.M. to consider testimony from the general public for the necessity of such Notice of Disclaimer and acknowledgment thereof by permittees of the City of Renton, and the necessity for recording of this resolution as constructive notice to all parties of the inability of the Federal Emergency Management Agency to compute the actual elevation of the 100 year flood.

SECTION IV. That the Administration of the City of Renton is authorized to approve an estimated safe flood zone within the Green River Industrial Area for purposes

of determining which permittees must be required to acknowledge receipt of the Notice of Disclaimer.

PASSED BY THE CITY COUNCIL this 21st day of September, 1981.

/s/ Delores A. Mead
DELORES A. MEAD
City Clerk

APPROVED BY THE MAYOR this 21st day of September, 1981.

/s/ Barbara Y. Shinpoch
BARBARA Y. SHINPOCH
Mayor

Approved as to form:

/s/ Lawrence J. Warren
LAWRENCE J. WARREN
City Attorney

NOTICE OF DISCLAIMER

TO: Permittee—Permit No. _____

RE: Construction Permits within Green River Industrial Area

You are notified that the City of Renton has received some indication that the data used to compute the level of the 100 year flood for purposes of calculating the minimum building elevation may be incorrect. The Federal Emergency Management Agency has computed the hypothetical level of the 100 year flood for purposes of flood insurance coverage and building elevation. However, there is no presently reliable data with which to calculate the actual elevation of the 100 year flood.

Therefore, the City of Renton disclaims any liability for all damages which may be sustained by you for property damage, or otherwise, based upon the City's issuance of the above stated permit. You are advised to seek your own consultant for counsel concerning the advisability of commencing construction based upon the above stated permit.

DATED: _____

CITY OF RENTON

By _____
Building Department

ACKNOWLEDGMENT

I acknowledge receipt of this Notice of Disclaimer, and I understand that the City of Renton will not issue the above stated permit without my execution of this acknowledgment. I understand that this Notice is given as a protection to me to avoid potential damage to person and/or property which I may sustain by reason of flooding.

In consideration of the issuance by the City of Renton of the above stated permit, I agree to release and hold harmless the City of Renton from all damages which may be sustained by me or anyone holding any interest in the real property owned by me, including lessees or purchasers from me, whether property damage or otherwise, based upon the issuance by the City of Renton of the above stated permit.

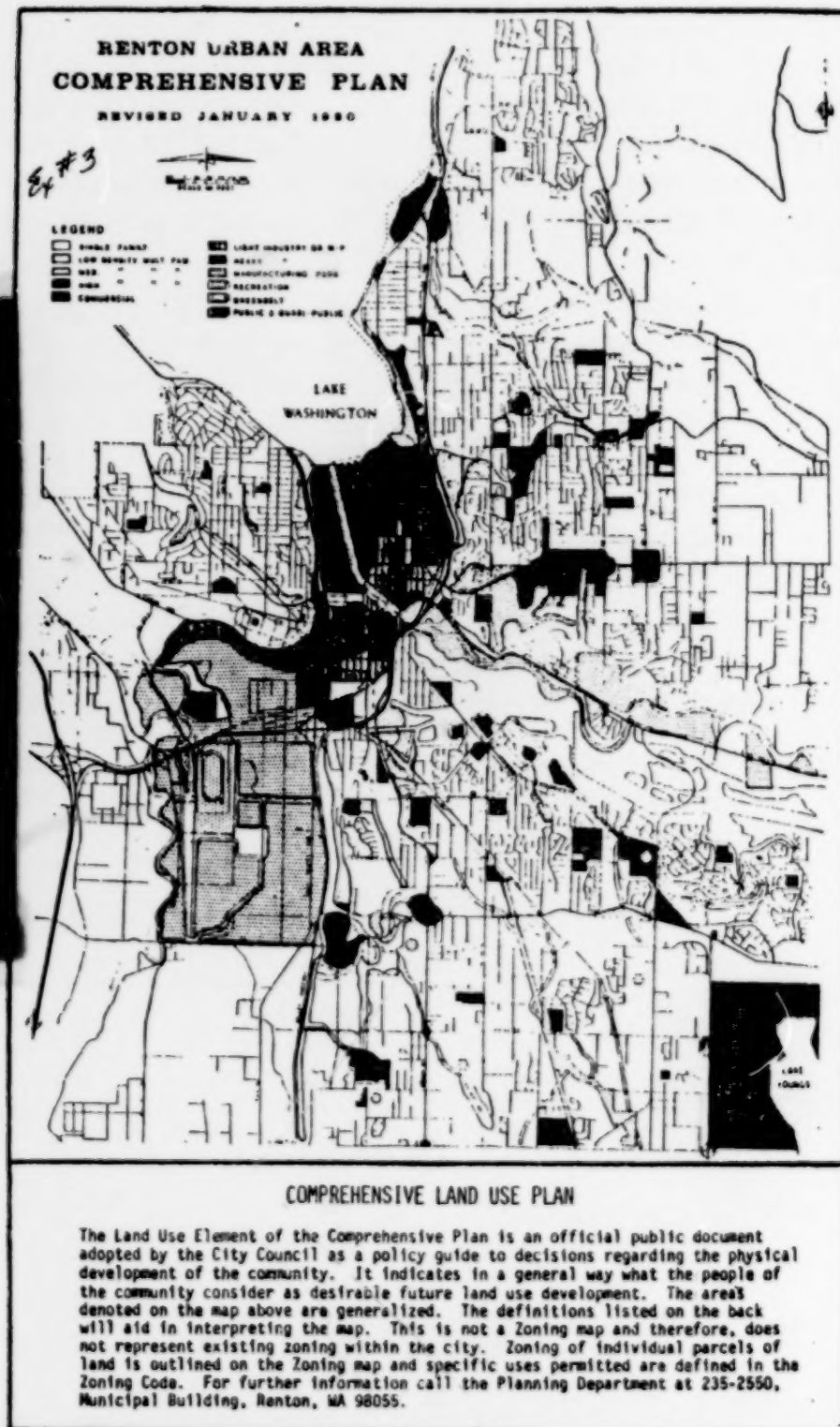
I further agree to deliver to all lessees or purchasers who may now or hereafter hold any interest in the real property owned by me, a copy of this Notice of Disclaimer.

By requesting the issuance of the above stated permit by the City of Renton I assume all risks of proceeding with construction based upon the permit.

DATED: _____

Permitee

[EXHIBIT 3]

COMPREHENSIVE PLAN LAND USE
DESIGNATIONS*SINGLE FAMILY RESIDENTIAL*

An area intended to be occupied by a single family dwelling unit or related compatible uses.

LOW DENSITY MULTI-FAMILY RESIDENTIAL

An area intended for two-family dwellings and limited special uses.

MEDIUM DENSITY MULTI-FAMILY RESIDENTIAL

An area intended for Medium Density/Medium Rise residential uses such as apartments and townhouses.

HIGH DENSITY MULTI-FAMILY

An area intended for residential uses allowing the maximum number of dwelling units, the maximum number of stories, and the maximum proportion of land area coverage permitted in the city.

COMMERCIAL

An area intended as a retail area with some non-industrial wholesale and service activities, office buildings, and uses devoted to the traveling public, such as hotels and motels.

MANUFACTURING PARK

An area designated as having light and certain compatible heavy industrial uses with selected commercial uses in a manufacturing park type development which includes, but is not limited to, adequate setbacks, landscaping, functional design, compatibility with adjacent uses, open space, wildlife habitat, and perhaps joint use of facilities.

LIGHT INDUSTRY OR MANUFACTURING PARK

An area designed as having industrial activities and uses involving the processing, handling and creating of products, also research and technological processes which are devoid of nuisance factors, hazard, or excessive demands upon public facilities and services.

HEAVY INDUSTRY

An area designated as having industrial activities and uses involving manufacturing, assembling and processing, bulk handling of products, large amounts of storage, warehousing, heavy trucking and all other uses, excluding single family and duplex residential dwellings.

PUBLIC AND QUASI-PUBLIC

Those areas in which publicly and certain privately owned uses are located, which include utilities, health care, churches, clubs, or philanthropic institutions primarily designed to promote the public welfare or serve the public on a non-profit basis.

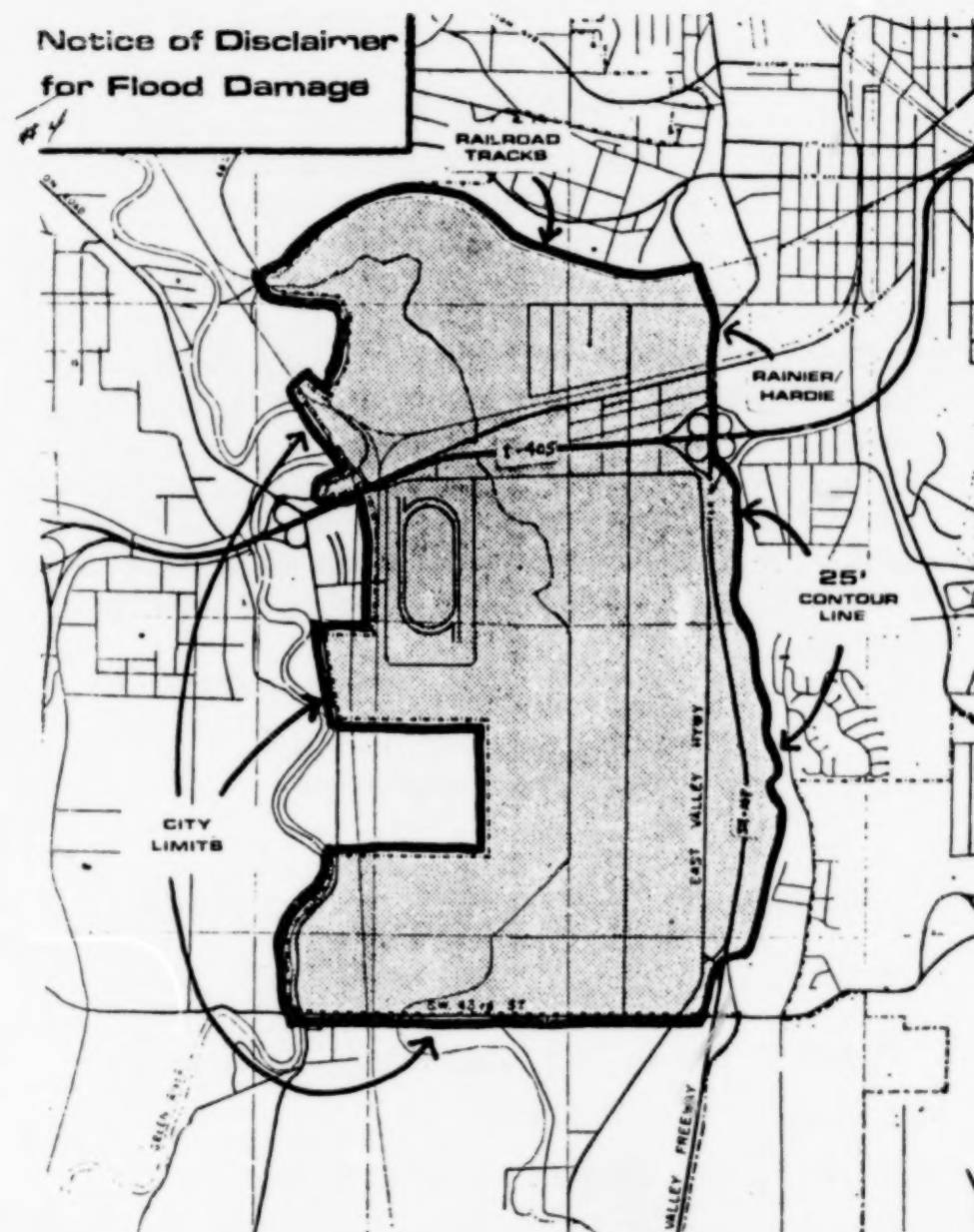
RECREATION

Those areas designated primarily for leisure time pursuits by members of the public, for active and passive recreation which includes such land uses as parks and playgrounds.

GREEN BELT (LIMITED DEVELOPMENT AREA)

An area with severe topographic, ground water, slide potential or other physical conditions which impair development, and is intended to be developed in extremely low density single family, recreation, open space, or other compatible low density use.

[EXHIBIT 4]



BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. C 82-59 M

PLAYTIME THEATERS, INC., a Washington corporation,
and KUKIO BAY PROPERTIES, INC.,
a Washington corporation,
vs. *Plaintiff,*

THE CITY OF RENTON, and THE HONORABLE BARBARA Y.
SHINPOCH, as Mayor of the City of Renton and EARL
CLYMER, ROBERT HUGHES, NANCY MATHEWS, JOHN
REED, RANDY ROCKHILL, RICHARD STREDICKE, and TOM
TRIMM, as members of the City Council of the City of
Renton; Served on DELORES A. MEAD, City Clerk and
JIM BOURASA, as Acting Chief of Police of the City of
Renton,

Defendants,

jointly and severally, in their
representative capacities only

DEPOSITION UPON ORAL EXAMINATION OF
DAVID R. CLEMENS, VOLUME I

Taken at Renton City Hall, Renton Washington

DATE TAKEN: March 3, 1982

COURT REPORTER: PEGGY MITCHELL, RPR

BURTON, WILKERSON & PHELPS, INC.
Registered Professional Reporters
1206 Bank of California Center
Seattle, Washington 98164
(206) 623-7178

APPEARANCES

For the Plaintiffs:

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Hubbard, Burns & Meyer
10604 NE 38th Place
Kirkland, Washington 98033

For the Defendants:

DANIEL KELLOGG
MARK E. BARBER
Warren & Kellogg, P.S.
100 South Second Street
Renton, Washington 98057

Also present: Ron Nelson

INDEX

ATTORNEY

Mr. Burns

EXAMINATION

pg. 2

EXHIBITS

NO.

DESCRIPTION

MARKED

1

Map

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[2]

RENTON, WASHINGTON;
WEDNESDAY, MARCH 3, 1982

1:00 p.m.

DAVID R. CLEMENS

having been duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. BURNS:

Q This is a deposition of David Clemens being taken pursuant to notice and a subpoena; as well, Mr. Clemens as been designated by the City of Renton to testify with respect to certain matters relating to the zoning laws of the City of Renton and the building requirements relative to the construction of theaters within the corporate limits of the City of Renton, and pursuant to the Rules of Federal procedure.

Mr. Clemens, would you state your name and address for the record, please?

A David R. Clemens. 201 Mill Avenue South, Renton, Washington. 98055.

Q And are you married, Mr. Clemens?

A Yes, I am.

Q Do you have any children?

A No.

[3] Q And how old are you?

A 36.

Q What's your educational background, sir?

A I have a Bachelor of Science degree in industrial design from San Jose State University. Post graduate certificate in city and regional planning from the University of California at Berkley.

Q That's a post graduate certificate?

A Certificate.

Q What kind of course of study is required to get that post graduate certificate?

A There are four core courses administered by the university, followed by two elective courses at any other accredited university, followed by the receipt of a certificate.

Q Is that something like a Masters Degree or is it something else?

A It would fall somewhere between a Bachelors and a Masters Degree. It is not a full Masters Degree.

Q Do you have any other educational or have you attended any other educational institute doing post graduate work?

A No.

Q And when did you complete this post graduate certificate program at the University of California?

[4] A I believe it was in August of 1974.

Q Thereafter, did you seek employment in the job market?

A I was previously employed in the job market since 1971.

Q Where was that?

A City of Milpitas, M-I-L-P-I-T-A-S, California.

Q And when did you leave the City of Milpitas?

A In August of 1978.

Q And during the time that you were employed by that city, what positions did you hold?

A Virtually all positions within the City's Planning Department ending with four years as principal planner for the City of Milpitas, that would be the person in charge of the planning section of the Community Development Department of the city.

Q And after August of '78, where did you go?

A City of Renton.

Q Have you been employed by the City of Renton since that time continuously?

A That's correct.

Q And what positions have you held at the City of Renton?

A Assistant planner, associate planner, senior planner, acting planning director and policy development [5] director.

Q Now, during what period of time did you hold the job as assistant planner?

A I believe from September of '78 through the spring of 1979. Would have been April or May approximately.

Q In general terms, what were your duties as an assistant planner?

A As assistant planner, I was responsible for zoning enforcement and interpretation for the City of Renton.

Q In connection with that, would you review every building permit or application to determine whether it complied with the zoning laws and things of that nature?

A That's correct.

Q As an associate planner, what were your—strike that.

How long were you associate planner?

A I believe it was a period of about two months, transition between assistant planner and senior planner.

Q How did your duties vary as associate planner?

A No change.

Q Distinction without a difference?

A Simply different title for doing the same work.

Q As a senior—when did you become a senior planner?

[6] A I believe it was roughly mid year of 1979. June or July.

Q What were your duties as a senior planner?

A As senior planner, I was responsible for comprehensive planning for the City of Renton, development of the comprehensive plan, working with the planning commission in development of plans and implementing policies.

Q When did you become the acting planning director?

A January of 1980. I am sorry. January of 1981. Missed a year.

Q So for approximately a year and a half, you were a senior planner and then you became the acting planning director.

A That's correct.

Q I take it the planning director had left.

A Yes.

Q And who was the planning director just prior to your becoming acting planning director?

A Gordon Y. Erickson, S-O-N.

Q And was he generally your supervisor while you were associate planner, senior planner?

A That's correct.

Q And when did you become policy development director?

A December 1st of 1981.

[7] Q Was there a policy development director prior to December 1 of 1981?

A No.

Q So it is a newly created position?

A That's correct.

Q Is it—there now a planning director or is it a combined function?

A There is no planning director. The typical zoning enforcement administrations functions are now in the combined building and zoning department. The policy development department is almost exclusively involved now in long-range planning and policy development.

Q So as planning director, did you deal with building and zoning enforcement?

A Yes.

Q And now as policy development director, your duties have changed somewhat?

A To emphasize comprehensive planning rather than individual permit review and administration.

Q Is there someone who is in charge of zoning at this particular time, zoning enforcement and review?

A The department head would be Mr. Ron Nelson, building director.

Q That is the gentleman seated down here at the end of the table?

[8] A That's correct.

Q Are you generally his supervisor?

A No. We are mutual exclusive department heads.

Q In the chain of command, you go down one branch and he goes down a different branch somewhere and you both have a supervisor that's above you somewhere along the line.

A That would be the Mayor.

Q So you are responsible—are you directly responsible to the Mayor?

A Yes.

Q And the Mayor is your immediate supervisor?

A That's correct.

Q And would the same be true of Mr. Nelson?

A Yes.

Q Now, you were asked to bring with you certain documents or—strike that.

You were served with a subpoena duces tecum?

A Yes.

Q You were asked to bring with you certain documents and you have brought those documents with you or are they in the packet of materials that were supplied to me?

A In the packet of materials supplied.

[9] Q So any summary of findings or conclusions relative to the zoning regulation of adult theaters in the City of Seattle?

A Those are retained in those documents.

Q And all material regarding the regulation of adult businesses reviewed or considered by you or your staff prior to the adoption of this Ordinance are in these materials?

A I believe those are one and the same.

Q And all other materials used by you in reviewing locational problems associated with adult businesses and used by you in advising the City Council planning staff or planning development committee of the City of Renton prior to or during the adoption of this Ordinance are in these materials?

A That's correct, I believe they are the same.

Q And you have available to you somewhere here today all detailed maps, drawings or photographs prepared by you which show those portions of the City which are not subject to the locational restrictions of the Ordinance?

A Okay. The map that was prepared during the time of the Ordinance adoption was destroyed shortly after the—shortly after or at the same time as the adoption took place, so the original maps are not [10] available.

Q Do you have any maps available today that you are currently using?

A The map within the affidavit is available that was in the previous testimony and we have prepared maps for the City Attorneys office at their request.

Q Now, there is—I had asked that you bring with you a comprehensive report from the City Attorneys identified in your affidavit relating to the proper scope of land use, regulations and experience from other cities and your attorneys have objected to that document. Are you familiar with that document?

A I have read it.

Q And when did you first see that document?

A I can't give you a precise date, but it would have been a period of probably two to three months prior to the adoption of the Ordinance.

Q Do you recall who the document was addressed to?

A No, sir, I don't.

Q Who gave you the document?

A To the best of my recollection, it came through the City's normal routing system in an envelope marked "confidential." I do not recall whether that was from the Mayor's office or from the attorneys office.

[11] Q And when you received that document, were you the acting planning director, senior planner, associate planner or assistant planner?

A I am not positive. I don't recall precisely. It could have been while I was still a senior planner. I don't recall precisely.

Q When you say it came through the normal routing channels or routing system, what is that system?

A City has series of mailboxes in the printshop area for each of the departments, and the section or clerical staff make pickup and deliveries from that facility.

Q And was this a document that was just left in a box with your name on it?

A I don't recall precisely what the envelope looked like. The only thing I recall for sure is that it did say "confidential" on it and it was sealed.

Q Did you—I take it you opened that and examined it?

A Yes.

Q Did you show the document to anyone?

A I assume that it was reviewed by both myself and staff people working for me.

Q And who were those staff people?

A At that time it probably would have been Gene Williams, or Roger Bloylock. B-L-O-Y-L-O-C-K.

[12] Q Did you discuss the contents of the letter or the report with anyone?

A Probably with those two staff people. And if—if I was still senior planner at the time, also with Mr. Erickson. As I say, I don't recall at the moment that I received it whether it—I was senior planner or acting director at that time.

Q Was that or—strike that.

You were in attendance at all City Council meetings, planning committee meetings and planning commission meetings involving the adoption of Ordinance No. 3526, were you not?

A City Council committees and council meetings. I was not involved in the prior discussion that was held with the planning commission. Mr. Erickson was directly responsible for that.

Q Did—was this report that we are referring to from the attorneys, was that ever discussed or referred to at any of the meetings that you attended?

A It was discussed at the planning and development committee. I do not recall whether it was discussed on the floor of the City Council.

Q And was that planning development committee meeting a public meeting?

A Yes, it was.

[13] Q And could you recall for me the best you can the context of the discussion about that document and what was said and by whom?

A To the best of my recollection, the assistant city attorney, Mr. Kellogg, was discussing the difficulties in drafting and ultimately enforcing regulations on adult entertainment land uses.

Q Was he, in fact, reading from his report?

MR. BARBER: Object to the form of the question. Go ahead.

A He may have read excerpts from it. He did not read the—its entirety. I would say that he probably summarized the key points.

BY MR. BURNS:

Q Do you recall any other occasion that that document was discussed in a public meeting?

A No.

MR. BURNS: Counsel, based on this testimony, it appears whatever confidentiality may have been attached to that document was waived by excerpts of it being read and its contents being discussed at a public meeting, and so I would request that it be produced.

MR. BARBER: Well, we disagree that there were necessarily excerpts of that report read at the [14] public hearing. And we will assert the privilege. Feel it is clearly covered by attorney-client privilege that it was transmitted among the City, as testimony has indicated, to various city employees in a confidential—an envelope marked "confidential" and we think it is clear it is covered by the attorney-client privilege. We will not produce it voluntarily.

MR. BURNS: I didn't expect you would.

BY MR. BURNS:

Q Mr. Clemens, at that planning and development committee meeting, are any transcripts kept of those meetings?

A No.

Q Any public record kept of those meetings?

A To the best of my recollection, there may have been notes prepared by myself, by the Council members that were present, possibly by the attorneys office, but no formal record in the form of minutes or similar document has been prepared or was prepared.

Q There are no tape recordings or videotapes or any of—

A No, no, sir.

Q As far as that.

Mr. Clemens, in your capacity as senior planner, acting planning director and now director of [15] policy development, are you aware of any documents that exist within the official records of the Renton or any of its agencies which would relate to the passage of Ordinance No. 3526 which have not been produced today in the packets that counsel gave me when we began?

A Not to the best of my knowledge.

Q So to the best of your knowledge, there is nothing other than what is in these packets that would exist that would relate to this Ordinance; is that what you said?

A That's correct.

Q And have you had an opportunity to search and review all the records in coming to that conclusion?

A Yes.

Q Mr. Clemens, for the purposes of a preliminary injunction hearing, you prepared an affidavit to which was attached a map. Do you recall that affidavit and the map?

A Yes, I do.

Q On that map, certain areas were identified by you as being locations where Ordinance No. 3526 does not

apply. Are you familiar with the way you had labeled that map?

A That's correct.

[16] Q For the purposes of our discussions today and tomorrow, are there—are these areas that were marked on that map the only areas where Ordinance No. 3526 does not apply?

A To the best of my knowledge, that's correct.

Q So you have not, since this original affidavit, discovered other areas that may be of concern to us.

A No.

Q Now, for the purposes of our discussion today, I have put on the bulliten board here a map which is entitled "A Zoning Map of the City of Renton" with a date—effective date of June 19, 1981. Are you familiar with that map?

A Yes, sir, I am.

Q And is that identical in major terms to the map which was attached to your affidavit?

A Yes.

Q And is this the current zoning map in effect for the City of Renton?

A There may have been revisions since that time, but none of substance that would affect this Ordinance, to the best of my knowledge.

Q Now, are the zones indicated on this map the current zones—strike that.

I have marked certain areas on this map in [17] red. And let me label them as 1, 2, 3, 4, and 5. Without getting into the exact detail of the locations, are those five areas the general areas that are marked on your map?

A That's correct.

Q Now, are those areas also currently zoned as indicated on this map?

A Yes, to the best of my knowledge they are.

Q So for Area 1, we are talking about an H-1 zone?

A That's correct.

Q For Area 2, we are talking about, I guess, a G zone?

A I believe there may be some light industrial in there. We have done some.

Q Down in this area?

A Yes.

Q And in Area 3, we are talking about probably a M-P zone?

A Correct.

Q For Area 4, we are talking about a B-1 down to a M-P and maybe a G?

A Correct.

Q And for Area No. 5, we are talking about M-P, H-1, L-1 and may be a little G; is that correct?

A That's correct.

Q Now, for the purposes of our discussion today, could [18] you come over here and mark on this bigger scale map, to the best of your ability, the exact boundaries of the areas identified on your map?

MR. BARBER: We will object to that. If you want to ask Mr. Clemens questions and have him answer referring to the map, that's fine, but we will not—we will direct him not to step to the map and to mark upon it.

MR. BURNS: Why?

MR. BARBER: Purpose of the deposition is to examine him orally.

MR. BURNS: Well, Mr.—he can—

BY MR. BURNS:

Q Mr. Clemens, with regard to this area that I have marked as No 2, which is shown on your map, how far to the north of this map does it extend?

A The area in question in Area No. 2 in all probability does not exist due to the Section, I believe it is 2 of the Ordinance. Let me check the precise language. I am sorry, Section B.

Q Section B of what?

A It is Section 4-735(B), which is the codification of—in Ordinance 3526.

Q Is it your testimony today then that the area marked as No. 2 on this map is not an available location [19] pursuant to Ordinance No. 3526?

A I believe that to be the case.

Q So in terms of the words used on your map, which was attached to your affidavit, Ordinance No. 3526 would apply in that area.

A That's correct.

(Discussion off the record)

BY MR. BURNS:

Q And going a step further so that it is absolutely crystal clear what your testimony is, if I wanted to locate an adult theater in this area marked roughly by Exhibit 2 or by No. 2 on this map, under the provisions of—in Ordinance No. 3526, I could not do so?

A I believe that would be the case.

Q Now—

A Can I have just a second?

Q Sure.

(Discussion off the record)

BY MR. BURNS:

Q Is there anything you want to add to your answer?

A No.

Q Now, we indicated or you previously testified that some of Area 2 may be covered by the designation L-1. Were you referring to the area down within the [20] intersection of these railroad tracks?

A Yes.

Q Is this whole area shown by No. 2 on this map and what is an attempt to approximate the area shown on your map, is that whole area unavailable for use as an adult theater or is there some area that extends down into the junction of the railroad tracks that may be available?

A There may be. I do not recall at the present time whether the mapping that we prepared for the Attorneys office includes a parcel within that area or not.

Q So there may be a parcel within the junction of these railroad tracks which is available.

A It is possible.

Q Now, let me label that on the map as No. 6. And you see where I put the No. 6?

A Yes.

Q And let me draw boundaries around it. Is that the area where you're now indicating that there may be a possible location but you're not sure?

A Either in that precise location or immediately adjacent to the south or west.

Q Immediately adjacent to the south or west. Could you come over here and point where you're referring to?

[21] A I believe if you simply extend the No. 6 that you have there slightly east and west from that location, that there may be a parcel in there that would apply.

Q Do you mean in this direction or towards this river?

A Yes. Westerly from the 6 towards the river.

Q And easterly over into this direction.

A In that general area there may be, but my recollection is not crystal clear.

Q Now, the area that we have designated with a No. 3, is that area, as I marked it on this map, a correct representation of the area shown on your map?

A It may be a little bit small, but it is essentially the correct geographical location.

Q And could you tell me if there are any streets that bound that particular location so that we can identify it with particularity?

A I believe the location is illustrated on the exhibit contained in my affidavit adjoined Powell Avenue Southwest.

Q And is Powell Southwest on its easterly side or is that on its southeasterly side?

A It would be on its easterly side.

Q Can you tell me what the approximate area of that location is in gross square feet?

MR. BARBER: If you know.

[22] A I have never measured it precisely, but it would be several acres in size.

BY MR. BURNS:

Q The area shown on your map is several acres in size?

A That is correct.

Q Now, the area shown by No. 4, I don't believe that this map correctly depicts it. Does that area extend more down like this?

A That's correct.

Q It includes all the way to the corporate limits of Tukwila that are shown on this map?

A That's correct.

Q And otherwise is it approximate within reason the area shown on your map?

A Yes, it does.

Q Does it extend any further to the north?

A I don't believe that it does. Without reviewing the maps we prepared for the attorneys office, I couldn't say precisely, but that appears to be generally the area illustrated on this map.

Q Now, generally, this area you are aware is owned by the Longacres Racetrack or whoever owns that particular property; is that correct?

A Yes, the majority of that is.

Q Now, all of this, is there any of this area [23] designated by No. 4 which is outside the Longacres Racetrack complex that you know of?

A I am not aware of the condition of the area shown on the map and designated with the zoning symbol G.

Q Down here at the bottom?

A The southerly piece. I am not aware whether that is specifically a part of the Longacres complex or not.

Q Now, with particular or drawing your attention particularly to the area on the east of Area No. 4, which appears to come out to the point on your map, do you see where I am referring to?

A Yes.

Q And I will mark that with an A so that we know what we are referring to.

Does any of that property extend or does that point extend beyond the Longacres Racetrack property, to your knowledge?

A I don't recollect the dimensions illustrated in the map we prepared for the Attorneys office. I believe that it is generally coterminous with the easterly property line of the racetrack.

Q And by that you mean it is all within the boundaries of the racetrack property?

A To the best of my recollection.

Q Now, who within the City of Renton's structure is [24] responsible for making the determination of these exact boundaries?

A It would be our office in conjunction with the building and zoning department to prepare an analysis of whether a particular parcel was within or without the regulations.

Q So it would be your responsibility and Mr. Nelson, who is sitting at the end of the table.

A Yes.

Q And you have made a determination as to the exact location of this easterly point in your capacity?

A For the purposes of review by the City Council.

Q For the purpose of review by the City Council.

A No. The City Attorneys office, I'm sorry.

Q But that's your responsibility to do that, is it not, if somebody were asked to do that?

A Yes.

Q And you have done that.

A That is correct.

Q Could I see a copy of that?

MR. BARBER: I object on the ground it is work product.

MR. BURNS: This is the gentleman who has got to make the determination. I want to know where the boundaries are and you are telling me you aren't [25] going to tell me where the boundaries are, you're going to keep it a secret?

MR. BARBER: I am telling you he prepared a map for the City Attorneys office at his counsel's request and that that was in anticipation after this litigation was started and it is work product.

BY MR. BURNS:

Q Well, will you prepare for me, will you as the responsible city official for determining, Mr. Clemens, the exact location of these boundaries and as the person who is responsible for making that determination, will you determine for me the exact easterly boundary of this area on your map?

A If the Attorneys office advises that we can, we would.

(Discussion off the record)

MR. BURNS: Will you ask him to do that or will you provide for me the exact location of this easterly boundary here?

MR. BARBER: We will not provide the map that we previously obtained on the ground it was privileged. If you wish to ask Mr. Clemens questions to ascertain the extent of his knowledge as to the easterly boundary, you may do so during this deposition.

[26] MR. BURNS: Let me ask it once again, Mr. Clemens.

BY MR. BURNS:

Q Does any of this property shown by No. 4 and particularly the point identified by A extend beyond the boundaries of the property owned by Longacres, a definite yes or no?

A I can't give you a definite yes or no.

Q But you have mapped that out for the City Attorneys.

A That's correct.

Q And they know one way or another whether it extends beyond or not.

MR. BARBER: I object to that question. Don't answer.

BY MR. BURNS:

Q But you have mapped that out for the City Attorneys?

A Yes.

Q And why can't you tell me or give me an answer to that today?

A The information that would be necessary to determine it is in the material that we prepared for the Attorneys office. I do not have in my head every parcel that is zoned or contains a single family use or is within the other prescribed limits of the Ordinance.

[27] Q Then to the best of your recollection, to the best of your knowledge, that property is all within the limitations of the Longacres property, subject to review of the material that you have prepared for the City Attorneys?

A Yes.

Q Is that material available to you?

A Yes, I assume so.

Q And could you review it and have an answer for me tomorrow when we continue this deposition as to whether or not that property is within the limits of Longacres or not?

MR. BARBER: He has already given his answer. We would object to that.

MR. BURNS: I want the record to reflect that Counsel for the City shook his head and indicated that he would not allow Mr. Clemens to review that material over the evening recess and have a complete answer for me tomorrow.

BY MR. BURNS:

Q Mr. Clemens, the area that I have identified with a No. 5, is this area roughly the same as the area shown on your map attached to your affidavit?

A With the exception of I believe it is—has slightly more east and northerly tilt. It is generally as [28] depicted.

Q When you say easterly, would you mean more in this direction?

A That's correct.

Q And how far to the east would it go with my pencil, over to approximately here?

A I cannot say precisely without reviewing the material prepared for the Attorneys office.

Q And that's all in the City Attorneys' office?

A That's correct.

Q Let me draw a line there just to approximate more to the east. When you say to the northeast, you mean there is a general slope in that direction?

A That's correct.

Q Let me draw that on the map. Now generally does that area identified by the No. 5 generally depict the area shown on your map?

A Yes, it does.

Q Now, do you know how far east from I guess it is Interurban Avenue, this non-included area extends?

A I believe it extends slightly further east than that depicted on the map, but, again, I cannot give you a precise boundary, but I believe it is a slightly larger area than you have illustrated in that Area 5.

Q Would it extend out as far as the L-1, area that's [29] zoned L-1 as depicted by this map?

A I believe it extends into—slightly into the M-P designated area, which is east of the L-1 parcel you have identified.

Q Would extend even further out into here; is that correct?

A Yes.

MR. BURNS: And I take it, counsel, you are not going to let him review his notes and materials and make the exact boundaries of these included areas available to me tomorrow when we continue this deposition?

MR. BARBER: We are not going to let you, in essence, get into our file through information that we are claiming work-product information on.

MR. BURNS: I don't want to look at the file. I want to ask the City of Renton what areas are covered by the Ordinance and what other areas are not.

MR. BARBER: Ask him the questions and he will respond.

MR. BURNS: He is telling me he can't respond, counsel.

MR. BARBER: You have got his testimony.

MR. BURNS: Okay.

[30] BY MR. BURNS:

Q Mr. Clemens, I have redrawn the non-covered portion to extend into the M-P area and marked it with a letter B, does that approximate the non-covered area that you are generally aware of?

A Yes, that would be approximately my best recollection at this time.

Q So we are clear, we have talked about five areas, we have specifically discussed Areas 2, 3, 4, and 5 and it is your testimony that Area 2 is generally not available, so Areas 3, 4, and 5 as we have discussed are the areas of the City of Renton where Ordinance No. 3526 does not apply and in which an adult motion picture theater could be potentially located; is that your testimony?

A The testimony was that the areas that you have depicted depict the areas on the map contained within my affidavit. The areas that you have designated as, I believe it is 4, that area, that's correct, in all probability is within the area restrictions of Ordinance 3526.

Q What do you mean, it is within the area of restrictions? You mean you could not locate an adult theater there?

A That's correct.

[31] Q So the area designated by the 4, you could not locate an adult theater; is that right, is that what you are telling me today?

A I believe that's correct.

Q So we can eliminate the whole Longacre site; is that a fair statement of your testimony?

A Yes.

Q So let me ask about area No. 3. Is that available to locate an adult motion picture theater?

A It would be available if the plat currently before the City of Renton is recorded. In the present undivided nature of the parcel, I believe it would not be available.

Q How about this potential area No. 6 that we identified, would that be available or unavailable?

A To the best of my recollection, I believe that there is a parcel within that area, but I cannot tell you precisely.

Q Now, Area No. 5, this area to the south down here that we have talked about, is that area generally available?

A Substantial portions of that area are available. There are parcels of property within that area which would not be available.

Q Perhaps you could describe for me generally those [32] areas within No. 5 which are not available. And I will try to mark them on the map as we go.

A I don't recall—I don't recollect precisely, but I believe the parcels in question are the parcels at the perimeter in particular of the northeast.

Q When you say northeast, you're talking about where, generally here?

A Generally in those—generally in the northern half of the area that you just swept.

Q In the northern half of this area.

A Correct.

Q You mean the lines should be up a little closer or are you saying the lines should go like this?

A The line—the line of actual area would be more southerly and westerly from that line.

Q And by "that line" we are talking about this slanted line?

A That's correct.

Q Would be more to the south, this direction, and more to the west?

A That's correct.

Q Now, I am going to, just for the purpose of trying to map these out, if I did it like this, would that be approximately? I don't want a map—Counsel, can he come over to draw on the map just to ease this [33] whole thing rather than me guess where he is talking about?

MR. BARBER: I object to that.

BY MR. BURNS:

Q Well, why don't you—let's go through it this way then, Mr. Clemens. Is that the approximate line you would draw?

A My recollection is that the line runs generally in a north-south direction in the area in the vicinity of the symbol M-P. Extends southerly and then extends easterly approximately at the point of the line that you had previously drawn and illustrated with a crosshatching.

Q I didn't understand that. Could you point out to me without drawing on my map which area you're talking about?

A If you start at the M-P symbol.

Q Right here.

A And extend southerly to the crosshatched area, that would be approximately the area that would be deleted.

Q Start from the center of the M-P or out by the P or out by the M?

A I don't recall precisely. I would say probably somewhere in the middle.

Q Let me go from the middle down to here. Now you're [34] saying that from that portion to the—would this square be the excluded part?

A No. I believe the exclusion is east of that line.

Q So this triangular piece in here; is that right?

A To the best of my recollection.

Q Now let me outline that in black and we will give it a number, or letter. I have outlined it in black and labeled it with a C in black. Is that generally the area that you were talking about?

A Generally speaking.

Q Are there other areas within 5 which are not available for location for an adult theater?

A I believe if you create another area extending westerly from the M-P designation and extending westerly to the separation, the line separating the M-P and H-1 zoned area and exclude the area to the north, that would be another area of exclusion.

Q Let me just go through it here. If I drew a line like this, the area to the north would be excluded?

A I believe the line would be higher than that, but that for illustrative purposes that's probably close enough.

Q If I started approximately here, would that be an appropriate place to start?

A I can't precisely tell you the exact location, but [35] generally in that vicinity.

Q And I drew it parallel or due west over the—to the line that separates the M-P from the H?

A Yes.

Q And then I go north and create another triangular piece of property?

A That's correct.

Q And that's as I have marked it in black and given the symbol D, is that the area that you were generally describing?

A Yes.

Q And that area is also not available.

A An area generally of that illustrative shape, yes.

Q Are there any other areas within the area generally marked 5 which is not available?

A The parcels that are fronting on Southwest 43rd which is the southerly city limit line probably are not available. I do not recall precisely which of those would not apply. I believe that it extended from the railroad tracks westerly—I am sorry, easterly to include the areas designated on the map as the exclusion that we have already illustrated plus the area that extends up to the middle line between the two H-1 illustrations on the map.

Q Let me see if I have you right. You're saying that [36] the area up to this line, is that what you are talking about?

A Between—east of the railroad tracks which are designated by the dash line.

Q Approximately right here over to a point approximately right here and south to Southwest 43rd?

A Yes, an area of approximately that area.

Q Let me draw that on the map and we will give that a label. That's an area that starts at this point right here, you see where I am?

A Yes.

Q And it runs over to approximately this point?

A Yes.

Q And then south down to 43rd to the intersection—intersected with the point that we have already identified with a B; is that right?

A Yes. That's to the best of my recollection.

Q And let's call that Area E. Are there any other areas within the area generally numbered 5 which are not available?

A To the best of my recollection, that's approximately the areas remaining.

Q Now, does the City of Renton own any property over here in the M-P area that I am pointing to on the far [37] westerly portion of this property?

A Other than city street right-of-way, I am unaware of any property ownerships of the City.

Q If it's determined the City owns any property over there, do you have any knowledge of whether or not the City would make that property available for adult theater use?

A If the City had property in that area?

Q Yes.

MR. BARBER: If you know.

MR. BURNS: That's all I asked him.

A I don't know what the Council's determination on that would be.

BY MR. BURNS:

Q Would that be an area that you would get into in terms of your policy development and so on?

A It is possible. We would normally be involved in recommendations to the Mayor and Council on use of public property.

Q If it turned out you were asked for a recommendation, what would your recommendation be?

MR. BARBER: Objection; calls for speculation.

MR. BURNS: You can answer it.

A I would think that as the most appropriate land use [38] for the area that we would not be in favor of use other than an industrial use in that zoning.

BY MR. BURNS:

Q Mr. Clemens, in your affidavit dated January 27, you indicated that as illustrated on the attached map of the City of Renton, there is approximately 400 acres of Renton within which the City—within the City of land which does not fall within the locational regulations. Do you recall that statement?

A Yes, I do.

Q Now, for our purposes, I believe the Court has, at least preliminarily, concluded, and I want you to make

the assumption, this property identified in the Boeing site is not available. You know the site I am referring to?

A Yes.

Q I want you to—further you have told me that the area No. 2 is not available.

A Not in its entirety.

Q But we have relabeled it No. 6.

A I'm sorry.

Q The area that has a potential is No. 6 now, isn't that right?

A To the best of my recollection.

Q And we know that—you have told me today that [39] generally the area identified with No. 4 is not available; you have also told me the significant areas of Area 5 are not available. Have you had an opportunity to recalculate the available acreage of the City of Renton which does not fall within the locational regulations?

A No.

MR. BARBER: I object to the form of that question. You may answer.

A No, we have not recalculated.

BY MR. BURNS:

Q Do you have an estimate based upon your best guess having prepared—not based upon your best guess, but based upon having prepared the original acreage calculation and having included in your affidavit of what percentage of that original 400 acres you are not excluding?

A It would most certainly be more than half. I cannot give you a more accurate number than that.

Q So you are excluding more than half of the 400 acres now.

A That's—

MR. BARBER: Objection; asked and answered.

BY MR. BURNS:

Q So we are talking about an area that is something [40] less than 200 acres available to locate an adult theater.

A Yes.

Q Mr. Clemens, are you generally familiar with the legislative history of the Ordinance No. 3526?

A Yes.

Q Did you participate in the legislative process throughout its occurrence?

MR. BARBER: I object to the form of the question. You can answer, if you can.

A By participate, you mean was my office in the discussions that occurred surrounding the Ordinance?

BY MR. BURNS:

Q Yes.

A Yes, we were.

Q Were you present at the City Council meeting on June 23, 1980 wherein the Renton City Council undertook to study the subject of adult bookstores, films and novelty shops by referring the matter to the planning and development committee of the City Council?

A What date was that?

Q June 23, 1980.

A I do not believe that I was present at that Council meeting.

Q You are aware, are you not, that this matter—the [41] Ordinance was referred to the chairman of the planning commission for study, are you not?

A Yes, I am.

Q And that matter was referred back to the City Council without study, was it not?

MR. BARBER: I object to the form of the question. Lacks foundation.

A The commission did review the question, and my recollection is that they responded to the Council that

they had other more pressing issues that needed resolution.

BY MR. BURNS:

Q Is there any record that we have here other than those documents that you have given me that would reflect the study that the planning commission gave this Ordinance?

A I believe the documentation provided includes planning commission minutes on the subject.

Q Now, the development and planning committee held public hearings on this matter, did it not, on the matter of Ordinance No. 3526?

A No, sir, I believe that they were public meetings.

Q Did I make a distinction?

A Yes. The distinction is that a public hearing would require legal notice posting and a public meeting [42] does not.

Q Okay. So they had what you refer to as public meetings.

A That's correct.

Q And no notice is required to be given of those.

A That's correct.

Q And were you in attendance at the public meetings that were held by the planning and development committee?

A Subsequent to the action of the planning commission.

Q Now, they had a committee meeting scheduled for March 5, 1981, are you aware of that?

A Yes.

Q Did you attend that meeting?

A Yes, I did.

Q Is it true that the public did not respond to that meeting and it was continued or rescheduled?

MR. BARBER: I object to the form of that question.

A I believe March 5th was the meeting that we had extensive testimony.

BY MR. BURNS:

Q Excuse me. Excuse me. On February 9. Was there a meeting of the planning—just a second here—let's go back a little bit.

[43] Do you recall when the meetings of the planning development committee were scheduled relative to that Ordinance?

A No, sir, I don't have that at my fingertips. Although there were several meetings.

Q Do you recall that on—at the Council meeting on or did you attend the Council meeting on February 9, 1981?

A I don't recall whether I did or not.

Q Do you recall that there was a planning development committee meeting relative to this Ordinance that had to be rescheduled because the public did not respond to the notices?

A Yes.

Q And how many meetings were held by the planning and development committee relative to this Ordinance?

A I can't say precisely. My recollection is incomplete, but I would say in approximately six; there may have been more.

Q And how many of those meetings were public meetings?

A Every one.

Q Now, on March 5th, 1981, there was a public meeting, was there not, relative to this Ordinance?

A Yes, there was.

Q And there was public testimony at that meeting or [44] public comment at that meeting?

A Yes, there was.

Q And is that the only meeting where there was public comment about this Ordinance?

A No. There were several other meetings of the planning and development committee where members of the public did give testimony.

Q Is there any record by tape recording, videotape or minutes of those meetings of the planning and development committee which would describe or detail the comments made by the public relative to Ordinance No. 3526 or whatever it was called in its planning stages?

A Not to the best of my knowledge, there were no tapes or minutes.

Q Is there any record of the meeting of March 5, 1981?

A With the exception of notes which I originally took and I'm sure other members of the Council took at that time, there is no minutes or recordings that I am aware of.

Q Now, your notes and those of the Council are included within the documents that have been provided to me, is that true?

A My notes were removed from my file after several months after the Ordinance was adopted, since there [45] have been no action and my file was eliminated from our working file.

Q So we don't have your notes.

A No.

Q Do we have any notes that are included in these documents?

A I don't know. Apparently Mr. Kellogg's notes were—are included in the package.

Q Mr. Kellogg's notes, the City Attorneys notes?

A That's correct.

Q Do you have any independent recollection of what was said by various persons attending that meeting of March 5?

A Yes, I recollect the general testimony that was made and the testimony of several of the citizens is reasonably clear.

Q Do you have personal knowledge or can you identify the comments of any individual with the name of that individual today?

A The two that come to my mind are the superintendent of schools, Mr. Colvice, and I am not sure how you spell that, and Mr. K. Johnson, the director of the Greater Renton Chamber of Commerce.

Q Do you remember the names of any other individuals that were testifying that you can identify with their [46] specific comments?

A Not to the best of my recollection.

Q Did you know any of the other individuals that were testifying other than the school superintendent and Mr. Johnson?

A There may have been others that testified that I had either seen or come in contact with previously, but none that I can recall that I had any sort of a close knowledge of.

Q Is there any individual or any particular testimony that you can recall today that you at that time were aware that the individual had particular qualifications that made his testimony more than just a personal opinion?

MR. BARBER. I object to the form of the question.

MR. BURNS. You understand my question?

THE WITNESS: I believe so.

A The two people that I have indicated previously particularly stood out as individuals that did have expertise in the area that they were discussing.

BY MR. BURNS:

Q Do you recall anybody other than these two individuals?

A Not to the best of my recollection.

[47] Q Now, I recall that you testified about what these individuals said at the temporary restraining order hearing, but I don't happen to recall your testimony with regard to what they said. To the best of your recollection, can you recount for me what Mr. — the superintendent of schools said at that hearing?

A He was concerned about the impact of adult entertainment land uses on school education—the school education process and concerned about children walking or being in the vicinity of those types of land uses going and coming from school.

Q Did he express anything other than concern by way of factual material which would support the conclusions or concerns that he expressed?

A I don't recall any specific items of background that he provided other than his own opinion as an educator.

Q So to the best of your recollection, you recall the superintendent of schools offering an opinion, but you do not at this time recall any facts that he may have offered in support of that opinion.

MR. BARBER: Object to the form of the question.

A I believe that's correct.

BY MR. BURNS:

[48] Q Now, with respect to K. Johnson, the Renton Chamber of Commerce person, what in particular do you recall that he said? That is he rather than a she?

A It is a he. The comments that Mr. Johnson expressed were essentially twofold. The first was that adult entertainment land uses, I believe the term that he used was could, adversely affect business practices, property values within the City if allowed and he expressed secondarily that the City zoning regulations should be established to limit the location of those kinds of land uses.

Q Do you know what sort of business Mr. Johnson is engaged in?

A Other than being the manager of the Chamber of Commerce, I am not sure what his expertise or technical background is.

Q Did he identify any specific ways in which adult entertainment uses would adversely affect business practices or was that just a general conclusion that he stated?

A I believe that it was a general conclusion.

Q Do you recall any facts that he may have related at that meeting that would establish that adult entertainment uses could adversely affect business practices?

[49] A I don't recall at this time any specific facts that he related.

Q Do you recall any specific facts that he may have related which would substantiate his concern that adult entertainment uses could adversely affect property values?

A I don't recall any specific testimony.

Q Was there any specific testimony, to your recollection, by anyone at that hearing that offered facts in support of an opinion as to the effect of adult land uses or adult entertainment uses on the City of Renton or as they would affect the City of Renton?

A I don't recall at this time any such comments.

Q So you have no present recollection of any factual material offered at that public meeting; is that a fair statement of your testimony?

MR. BARBER: Objection; asked and answered.

A No, I don't recall any specific factual testimony.

BY MR. BURNS:

Q Is there anywhere where you know of where we could go today to determine if, in fact, there was any factual testimony offered, any document we could look at, anything that we could do to determine what had taken place at that meeting?

[50] A None that I am aware of. Could we break a second?

MR. BURNS: Sure.

(Short recess taken)

BY MR. BURNS:

Q Am I correct, Mr. Clemens, in stating that this Ordinance No. 3526 was considered by the City Council on April 13, 1981?

A If I could review the minutes, I could probably affirm that.

Yes, based upon the minutes presented, it appears the Ordinance was read for the second time and adopted on that night.

Q Now, when it says read for a second time, does that mean it was read for a first time sometime?

A There would have been a prior time that the Ordinance was read the first time.

Q Now, when it is passed, did you attend that meeting when it was passed?

A I don't believe I was at the meeting where the adoption took place.

Q Have you made any effort to identify the owners of the properties that are identified by No. 3 and generally the area No. 5?

A We have made no specialized effort to evaluate property ownerships. We are aware that the major [51] property owners in—who the major property owners are in those areas.

Q Who are the major property owners in the area No. 3?

A I believe there is a contract sale on that property from First City Equities Company to Holvick, H-O-L-V-I-C-K deReg, small d-e-R-E-G, and K-O-E-R-O-N-G, it is a Sunnyvale, California industrial park developer. The area generally designated as No. 5, the largest property owner in that area would be Burlington Northern Railroad Company, although it might be the title of Glacier Park Company, which is their land people.

Q Are there other major owners down in this area No. 5, in the Benaroya Business Park and the Cole Business Center?

A Yes.

Q Are you aware of any other property owners down in that area?

A I am certain there are others, particularly the smaller parcels along the West Valley Road adjacent to the westerly boundaries of the City.

Q Do you know generally who owns the area No. 6?

A I believe that is Burlington Northern, although it may have been transferred to some other entity.

Q Now you indicated in prior testimony that something [52] is going on with area No. 3, that there is a plat in process?

A Yes, that's correct.

Q And until that plat is approved, area No. 3 is not available; is that right?

A That's correct.

Q And so if this litigation were resolved today and if somebody applied for a permit to put an adult theater in the area No. 3 today, they could not do so.

A That's correct.

Q Through this area marked No. 5, there is a drainage ditch that runs through there, isn't there?

A That's correct.

Q Are there any special requirements or limitations about building around, near, over or across that drainage ditch?

A The City has two regulations that would apply: first, is the city storm drainage ordinance, I am not sure that's the precise title, which would apply to any properties within the City of Renton but particularly areas adjacent to designated flood ways and flood way fringes, certain regulations apply.

Q This is a flood plain ordinance you and I have spoken about generally; is that right?

A Yes, that's correct.

[53] Q And that requires execution of a waiver against the City prior to building.

A That's a separate requirement.

Q Okay.

A The flood way ordinance is—has been—ordinance in the regulations are spelled out in the City code. The resolution that you were speaking to was a separate action of the City Council relative to a finding by the Federal Emergency Management Administration that

concluded that their earliest flood hazard analysis in the City's areas designated as Green River Valley comprehensive plan area may have been incorrect.

Q What under this storm drainage ordinance, what are the general requirements then for building in this entire area?

A The requirements under the ordinance are that the finished floor elevation of any structure be above the designated flood elevation.

Q Has the flood elevation been designated?

A The FEMA and federal agency analysis has been completed and, as I noted, they found some difficulties with the original analysis. As a part of the Council's resolution requiring a disclaimer to be signed by properties developing within the valley [54] area, they also instructed the administration to develop interim regulations. The existing interim regulation would be one foot above the FEMA flood elevations.

Q So I could build today or—the FEMA flood elevations are in existence; is that correct?

A That's correct?

Q So if somebody wanted to build down there today, they would have to build a finished floor level one foot above the FEMA elevation; is that correct?

A That's correct. That is correct.

Q They would also have to execute the waiver required by Resolution 2421?

A That is correct.

Q Are there any other requirements or restrictions in that area that apply particularly to setbacks from that drainage ditch or building across it or doing whatever within an area near the drainage ditch?

A The flood hazard ordinance requirements would not allow any construction that would restrict the flood way or to reduce the available flood storage that's described in the flood fringe.

Q What does that mean, in layman's terms?

A In layman's terms, if you put down one acre foot of fill in order to get your floor elevation up to the [55]

required minimum, you would have to remove one acre foot of material from that area, if you were located within the flood fringe.

Q I guess—I don't understand you. You say if I put down one acre foot, I have to take away one acre foot?

A That's correct.

Q Where do I take it from?

A From the original site area.

Q How can I put and take away at the same time?

A Okay. What you would be required to do is excavate from the remainder of the parcel of the property that is not under the building the amount of fill which you import to the site to get your floor elevation up to the required level. Alternatively, you could build a structure on pilings so the flood area underneath would not be restricted.

Q Okay. So I think I understand now. So in order to build, I have to create a mound, taking the dirt from around the property site and putting it underneath my floor or I can build on pilings and not do anything, as long as my finished floor elevation is one foot above this FEMA level.

A That's correct.

Q Now, in particular, if I own a parcel of property [56] which—down in this southern area, which includes this drainage ditch, what can I do with regard to that drainage ditch? Can I build over it, can I build up to it? Those are two questions, but let's start with can I build over it?

A I believe that if the—as long as the flood way itself, which is, at least currently, is defined as being within the banks of the Springbrook Creek, as long as that is not disturbed by the construction, it may be possible to build over it. Now, I believe, although I am not positive, that the right-of-way for that creek is owned by Drainage District No. 1 of King County. In that case, I doubt that you would be constructing over it, but presumably it could be possible.

Q Now, I am showing you what is a marked-up copy of the Renton Urban Area Comprehensive Plan. Are you familiar with this map and drawing and things?

A Yes, I am.

Q Down here there is—there is and I am pointing to a green line which represents the drainage ditch which runs through area No. 5, am I not?

A Yes, you are.

Q Now with respect to this drainage ditch, you're telling me that a right-of-way is owned by Drainage [57] District No. 1?

A I believe that's the case.

Q Do you know how wide that right-of-way is?

A To the best of my recollection, I believe it is 40 feet.

Q 40 feet, so would be 20 feet on either side of the midline of the ditch or 40 feet on both sides?

A 40 feet total.

Q So for practical purposes, there is a 40-foot swath cut by this drainage ditch which is not available for building, is that accurate?

MR. BARBER: Object to the form of the question. I think it also misstates the testimony of the witness.

BY MR. BURNS:

Q Did you understand my question?

A If the question is is it available, does it comply with the Ordinance, the answer is yes.

Q That was not my question. As a practical matter, there is a 40-foot swath through here that somebody has a right-of-way, the drainage ditch people, for running their drainage ditch and that as a practical matter is not available; is that correct?

A I believe it would be technically feasible to construct over it if you could get permission from [58] the drainage district to use the property.

Q But in your opinion, you probly aren't going to get that opinion or that permission; that's what you said before, isn't it?

A I don't recall that I made any remarks about the drainage district's—desirability of doing.

Q The comprehensive plan map that I am showing you shows this tentatively, I think, as greenbelt, does it not, on the comprehensive plan?

A That's correct.

Q Is that currently in effect as greenbelt, this 40—strike that.

Is the area designated as greenbelt, is that the 40-foot swath or is it something greater than the 40-foot swath?

A It would be generally the area contained within the existing 40 feet.

Q Is that currently zoned or set aside for this greenbelt by the regulations of the City of Renton?

A No. I believe the zoning as indicated on the map is a variety of industrial zones, industrial and business zones.

Q What is the effect of this comprehensive plan for the purposes of future zoning?

A The comprehensive plan would be taken into [59] consideration at the time of rezoning of property to consider whether property should be left in its natural state, particularly in this case along the Springbrook Creek, and the case of the area No. 5, all of the zoning currently exists and the comprehensive plan would have little affect until we got to the plan review stage.

Q Now, would you be the person who would be the—involved in making those kind of decisions as to whether a prepared use in this area was consistent with your comprehensive plan?

A Yes.

Q Now, let's assume that this property is zoned where this swath grows through, is zoned H-1—I think part of it is within the H-1 area or may be it is all in the M-P area. If somebody came in with a use that was an ap-

propriate use for a M-P zone and wanted to locate within this 40-foot swath, and assuming they were able to get the permission of the drainage ditch to do that, what would be the position of the City of Renton?

MR. BARBER: Object to the form of the question.

MR. BURNS: Let me go back again.

BY MR. BURNS:

[60] Q Making those assumptions, would the City of Renton have the power to veto or would the plans of the developer be subject to an approval of the City of Renton?

A Yes.

Q And would that come before you for consideration?

A In part.

Q And you are the head of the policy development department which makes these comprehensive plan decisions, is that not correct?

A That's correct.

Q If that happened, what would be the position of your policy development department and what would be your recommendation as policy development director?

MR. BARBER: Object on the ground calls for speculation.

MR. BURNS: You can answer.

A I believe that our recommendation would be that the area that is physically the existing Springbrook Creek should be left in its natural state and the development be located outside of that immediate area.

BY MR. BURNS:

Q And by outside of that immediate area, do you mean outside the 40-foot right-of-way?

A At a minimum.

[61] Q If I wanted to locate anywhere else in the, say, the M-P area, let's just take it for an example, and I have a use that's permitted in the M-P zone, does your department or any department of the City of Renton have

any discretionary right to review the use that I want to put that property to?

A Not the use.

Q What kind of discretionary review exists that the City does have?

A Under the requirements of the M-P district, there is a site plan review requirement before the land use hearing examiner. That review would be a review of the physical structure, its siting on the property, requirements of parking and other minimum ordinance standards.

Q But those are objective criteria, are they not, that—let me go back and ask. Are those objective criteria set forth in the Ordinance?

A The building envelope is an objective criteria.

Q What do you mean by building envelope?

A That would be the area remaining on the property after you subtract the setbacks and height limitations.

Q So there are objective criteria that says I can put this many square feet and I have to have this many [62] parking stalls and I have to have this kind of construction and those kind of wires and things like that?

A That's correct.

Q Is there any discretionary review that the criteria may not be set forth in such objective standards?

A The criteria on the precise location of the building within the building envelope that I have described is more subject analysis. There may be other circumstances that would warrant locating the structure at a different point within the building envelope than proposed by the property owner.

Q So I can come to you with a site plan for my parcel of property and I can say I want my building here and you can say no, if you are going to build it you have to put it over here, as long as it is within the setbacks and the other kinds of things?

A Yes, the City would have that authority.

Q Now, that includes the M-P zone. Would that also be true for the H-1 zone?

A No.

Q So in the H-1—M-P zone, the City has discretionary authority about building location on the site.

A That's correct.

Q And no other discretionary authority.

[63] A Not to the best of my recollection.

Q Now in the H-1 zone, did I understand your testimony to be that the City has no discretionary authority if the use is an appropriate use for an H-1 zone?

A If it meets the Ordinance—the specified Ordinance standard for setback, parking, height and so on, there is no discretion.

Q Now, area No. 3 would be within that M-P zone; is that correct?

A That's correct.

Q Area No. 6, what zoning would that be, do you think, or can you tell from this map what zoning that is? Looks like it may be G.

A We've done a rezone analysis and that L-1 zoning classification that's slightly to the southwest may include that parcel. I don't recall precisely, but assuming that it was L-1 there would be no ability to modify a plan that was in conformance with the standards of the Ordinance.

Q How about in the G zone, assuming this may extend down into the G zone.

A If that's the G zoning classification, that would be a large lot, single family zoning classification and the standards again would be minimum standard requirements. No discretion.

[64] Q Would an adult theater use be permitted in a G zone?

A No.

Q So if in fact Area 6 is G, there would be—adult theater could not locate there?

A If it was in fact G at the time of the application, it could not.

Q Looks like we may have an area over here that is zoned B-P?

A Yes.

Q Is there any discretion allowed in a B-P zone?

A The only use allowed in a B-P zone is parking, but, again, there is no discretion. If the use was parking, and it met the code requirements, it would be allowed.

Q Now, with respect to this area that is identified then as B-P, would—could an adult theater locate there?

A Within the B-P zone, no.

Q So there is an area—this looks like a very slender rectangular piece of property that is within the B-P zone. Is that—that is the B-P zone and looks like it does not extend over to here or is that right or is that how you would look at that?

A I believe that it is one contiguous parcel, that is zoned a combination of B-P and H-1. The portion that [65] is designated B-P could not be used for an adult theater; however, the parking for an adult theater could be located within the B-P zone and the theater located on the portions zoned H-1.

Q Is that—okay. So you could use that for parking, but couldn't put the physical building?

A That's correct.

Q Within the Renton city codes, are there any provisions which relate exclusively to the dimensions, size and other building requirements of a motion picture theater?

A Not within the City Zoning Ordinance. There may be minimum code requirements that relate to the building code as far as the minimum dimensions, but as far as the zoning regulations are concerned, I am not aware of any.

Q Now, I believe that you were designated to testify about building code matters. Do you have any knowledge of the building code of the City of Renton relative to what requirements, if any, exist for the construction of a motion picture theater?

A Not building code itself, no.

Q Would Mr. Nelson have that information?

A Yes, he would.

Q Do you have general knowledge with respect to the [66] parking, setback and land area and landscaping requirements for a motion picture theater as opposed to other uses that may exist in the various zones where an adult motion picture theater would be located?

A Yes, I do.

Q Do those restrictions generally relate to motion picture theaters wherever they are located as opposed to a distinction between adult motion picture theaters in these particular areas and a general release motion picture theater that may be located elsewhere?

A I am not aware of any distinction, other than the locational criteria for adult theaters.

Q So absent the locational criteria for adult theaters, there is one set of rules that would apply to regular theaters or general or adult motion picture theaters if you were going to construct them?

A That's correct.

Q In other words, if I went into, say, the B business district, wherever it is, up there, and I were to build a general release motion picture theater, the parking requirements would be the same there as they would be, say, down in the M-P area?

A That's correct.

[67] Q With respect to capacities, if I were to build within the corporate limits of the City of Renton a motion picture theater designed to accommodate 400 patrons, would there be any minimum size requirements?

A Not as it relates to the zoning regulations.

Q I am talking about the building regulations.

A I can't speak to that specifically.

Q So you don't know what the building restrictions are; that you have so many square feet per number of people.

A No, I don't.

Q If I were to build a motion picture theater that were to have a capacity for 400 people, are you aware of—are there any parking requirements—

A Yes, there are.

Q —that I would have to provide?

A Yes, there are.

Q What are the parking requirements?

A City's parking requirements for theaters would be one parking space for each four fixed seats or one parking space for each 100 square feet of floor area where there are no fixed seats.

Q Is there a minimum size parking space?

A The minimum standards on parking stalls is 9 x 20 for standard vehicle and eight—I am sorry. I believe [68] it is 9 x 16 for compact vehicles and you can have 25 percent of the parking space in compact spaces.

Q 9 x 20 standard, 9 x 16 compact?

A I believe that's correct. Either nine or eight. I don't have it on the tip of my tongue. Would you like me to review that specifically?

Q Well, yeah. Mr. Clemens, maybe I can cut through all of this a little bit. And what I am postulating is a theater of—that has a building area of approximately 6,000 square feet that contains approximately 400 seats, has a concessionaire that you would generally find in any conventional motion picture theater, has a projection booth and has restrooms for ladies and gentlemen and was built according to code as opposed to wheelchair slots and all the kinds of things that are needed according to current building codes, and my question, when I get right down to the bottom line, is how much area am I going to need in a M-P zone or a H-1 zone or a L-1 zone in order to put that theater on that site assuming setbacks and assuming all the other things that you have in your standard ordinary requirements?

A Would you give me the seating again, please?

Q 400 seats.

[69] A 400 seats.

Q A building size of approximately 100 x 60 or 6,000 square feet would probably accommodate that use.

A Okay.

Q Do you understand my question and what I want to know?

A Yes, I can give you a rough estimate.

Q Okay.

A The seating—the parking requirement for 400 seats would be one per four seats which would be 100 parking spaces. And as a rule of thumb that we use when we are just postulating, we would use 400 square feet of site area to accommodate each parking space, that would be both the space itself and the aisles necessary to get in and out. So assuming 100 spaces, and 400 square feet, that would require approximately 40,000 square feet plus the building, which would come to 46,000 square feet, and assuming ten percent error factor on top of that for necessary setbacks, landscaping, I would say probably between 50,000 and 52,000 square feet of site area. Depending on its configuration and other factors that may not be known.

Q Are the setback requirements the same in the M-P zone as in the L-1 zone?

[70] A No, they are not.

Q You have given a benchmark here of 50,000 to 52,000 square feet roughly. Would—now, in which zone would that apply?

A That would apply in the B-1 zone, on up through our zoning classifications, so that would be the B-1, L-1, H-1 and M-P.

Q Now, aren't there more stringent setback and landscaping requirements in the M-P zone as opposed to the H-1 zone?

A I believe the landscaping requirements may be slightly more restrictive. The setback requirements are essentially the same. The building setback requirements between the M-P and H-1.

Q Does there have to be any buffer zone in any of these zones that would have to be provided for between your use of the property and the adjoining properties?

A With the exception of the M-P zone, if there was a determination that an alternate location within the building envelope was appropriate, there might be a requirement for landscaping separating one use from another, but there is no specific requirement in any of the zones for buffers between uses.

Q And the buffer zone would only be applicable in the M-P zone?

[71] A If appropriate.

Q And could the parking areas, the parking area that you are providing, generally calculated in terms of—included in your setbacks?

A Yes. The 400 square feet per space and plus the ten percent for fudge factor would include all of the requirements that would typically apply.

Q So I can park right up to the edge of my property line.

A In some zones there is a minimum setback from the street right-of-way—I'm sorry. In all zones there is a minimum of five-foot setback, landscape setback from a public street to a parking lot. In the M-P and I believe the H-1 zone there is a ten-foot landscape setback requirement.

Q Is that from the streets?

A From the street property line.

Q Not from sideline boundaries or rear boundaries?

A No.

Q So I could do nothing there except put in landscaping.

A That's correct.

Q Now, the 50,000 to 52,000 foot figure that you gave me generally related or generally would have included the setback requirements?

[72] A Yes.

Q So if I am going out to look for properties in these areas and I want to build a 6,000 square foot building with 400 seats, I know I am going to need—I have to find an acre and a quarter somewhere, roughly?

A Approximately.

Q Can we go off the record for a minute?

(Discussion off the record)

BY MR. BURNS:

Q Mr. Clemens, the zoning classification, the particular zoning use for adult motion picture theater did not exist prior to the enactment of 3526 within the City of Renton, did it?

A No.

Q So it is a new use classification, is it not, that was created by this Ordinance?

A It is a distinction between two types of motion picture theaters.

Q And that distinction did not exist prior to enactment of the Ordinance, did it?

A That's correct.

Q I take it that it is from documents that have been filed by the City's attorneys that they are contending that the use for an adult motion picture [73] theater is a permitted use within the B-1 zone; are you familiar with that contention?

A Yes, I am.

Q Now, I have reviewed your zoning code and I believe that Section 4-711 sets forth the uses that are allowed in the B-1 zone, does it not?

A Yes, it does.

Q Could you direct me where in that section you find that an adult motion picture theater is a permitted use within the B-1 business district?

A It is not specifically set forth; however, the City has interpreted, since long prior to my coming to the City, that commencing with B-1 district, a theater use

and many other uses that are not specifically set forth in the B-1 district are allowed as being uses similar to the uses specified in the B-1 district.

Q So it is not specifically set forth, you acknowledge that; that a theater use nor an adult theater use is particularly set forth as a permitted use in the B-1 business district?

A No, it is not.

Q Under which of these many classifications, if any, do you fit those uses or is it some other policy that has created an unwritten use?

A The City in its interpretation requirements looks [74] at the district as a whole to establish the types of uses that are allowed, and in taking the district as a whole, the City, by past practice, has established that theaters, motels and hotels, which are not specified within the zoning particularly, are uses which are allowed in the zoning classification as being similar to the whole array of uses that are established in the—that section of the code.

Q So I take it from your testimony that you do not contend that a theater use or adult theater use falls within any of the delineated classifications under Section 4-711 but rather by way of past practice and general character of the City has administratively determined it is an appropriate use for that classification?

A That's correct.

Q Now, is there any policy or statement or writing which sets forth this determination by the City that, first, theaters are permitted within the B-1 zone?

A I am not aware of any such written determination.

Q In your capacity as assistant planner or associate planner, senior planner, acting planning director, now policy development director, if such a writing existed, would you be aware of it generally speaking?

A I would think so.

[75] Q Is there any writing that exists by the City of Renton or any policy that is set forth in writing that

sets forth that an adult motion picture theater is a permitted use within the B-1 zone?

A I am not aware of any such written statement.

Q So if I were to come to town and look at your zoning code, it would not tell me on its face and there is no writing that I could ask for that would tell me that a theater or an adult motion picture theater was a permitted use in the B-1 zone; is that correct?

MR. BARBER: Objection, asked and answered.

BY MR. BURNS:

Q Is that correct?

A The—there would be no written document that we could hand you; however, if you requested an interpretation in writing from us, we would answer affirmatively to both the theater use and adult motion picture theater use with the exclusion of the locational criteria for an adult motion picture theater.

Q We are understanding each other just fine.

Now, I want you to assume for the purposes of the next series of questions that I am going to ask you that the City has not made that determination; that a motion picture theater is a [76] permitted use in the B-1 zone. If a motion picture theater wanted—and I take it from reviewing the criteria also for a M-P zone, that a motion picture theater or an adult motion picture theater is not a permitted use in writing, included within the designated permitted uses, is it?

A The M-P zone.

Q Yes.

A That is correct, sir.

Q And the answer would be the same for the L-1 zone?

A Yes.

Q And for the H-1 zone?

A Yes.

Q And the reason I take it that you indicate that those uses are included within the zones is by reason of

the fact that any use that's permitted in a B-1 zone is also permitted in these zones.

A That's correct.

Q Now, assuming for the purposes of my next series of questions that the theater or adult motion picture theater is not a permitted use in the B-1 zone, what would be the proper zoning procedure to get or to use a parcel of property located in a M-P zone as a theater; would that be by special permit, conditional use or variance?

[77] MR. BARBER: Object to the form of the question.

MR. BURNS: Do you understand my question?

A Yes. If a person desired to construct any type of motion picture theater within the M-P zone, the criteria would be application to the City for site plan approval within the allowed uses in the M-P zone district.

BY MR. BURNS:

Q Now, if a motion picture theater use were not an allowed use because we have a dispute as to whether it is an allowed use or not and I want you to assume it is not an allowed use—

A Okay.

Q —would, in order to build that building or structure or you develop it for that use as a theater or adult motion picture theater, would you be required to get a conditional use permit, a special permit or a variance?

MR. BARBER: Object to the form of this question also.

MR. BURNS: You understand it?

A Under the assumption that the use was not allowed within the district, I would think that the probable form would be a conditional use permit.

[78] BY MR. BURNS:

Q Now, who—and you make that assumption based upon your experience in these various capacities that you

have held in connection with zoning enforcement within the City of Renton; is that correct?

A Yes.

Q Now, if your assumption—who would overrule you as to your assumption as to the appropriate procedure?

A The appropriate procedure in a case where there is a dispute over whether a use is or is not allowed is an appeal to the land use hearing examiner.

Q So if I came in and, for instance, let's assume that my client came to town and he wanted to build a theater in the M-P zone and he contended that he was allowed to build it there as a matter of right, assuming that he met the other criteria for that zone, and the City said no, you aren't, that's not an appropriate use for that zone, his remedy would be appeal to the land use hearing examiner; is that correct?

MR. BARBER: Object again to the form of the question. You may answer.

A The appeal would be to the examiner, that's correct.

BY MR. BURNS:

Q And what provisions of your zoning code govern that [79] appeal process?

A The entirety of the ordinance which is Chapter 30 of Title 4. It is a code that's outside of the zoning ordinance itself.

Q Do you have that here with you over there?

A Yes.

Q May I look at it?

MR. KELLOGG: Let's go off the record for a minute.

(Discussion off the record)?

A I believe the second section establishes the items that the examiner is empowered to consider. It is a whole list.

BY MR. BURNS:

Q Under "duties"?

A Yeah.

Q Now, in our assumed example here, we have a dispute as to whether a use is an appropriate use and my client has appealed to the City hearing examiner and he has had a hearing in conformity with the procedures set forth by your city code and the hearing examiner, in my example that we are going through, decides in favor of the City, that it is not an allowed use within that particular zone. Are you with me?

[80] A Yes.

Q Okay. My client still desires to proceed with his project and build a theater. What would be his next step in trying to accomplish that goal?

MR. BARBER: Object to the form; speculation and assumes facts not in evidence. Answer if you can.

A There are two possibilities: one is an appeal to Superior Court for a determination in Superior Court as to the correctness of the City's position. Alternately, I am going to have to review the conditional use section to see whether there is sufficient flexibility.

(Discussion off the record)

A I am not sure whether there would be any alternate approach within the City's code if the examiner concluded that it was not a permitted use. The—there is a possibility, depending on the specific circumstances what zone it is in, that a conditional use permit to allow a less restricted use in a more restricted district could be possible, but failing that, the only alternative would be to request the City Council to amend the ordinance to set forth that use specifically as permitted or conditional use.

BY MR. BURNS:

[81] Q I see or I find in your zone code three different kinds of possible avenues, one being the special permit, the conditional use or the variance. In your experience and based upon your position as the enforcement officer

for the zoning code, what is the purpose and use of the special permit as it applies to your zoning ordinance?

A The special permit provisions only apply to those uses that are specifically set out in the code as being permissible with a special permit.

Q Could you refer me to the section of your Ordinance that you're referring to?

A Would be 4-722, Paragraph B.

Q 4-722B talks about particular or gives the hearing examiner power to issue special permits for such uses. Which uses are those?

A Those would be uses specified elsewhere in the ordinance which particularly set forth that the standards to be used are a special permit approval. And there are numerous.

Q Can you identify—well, let's do it by elimination. Is a motion picture theater or an adult theater a use that is set forth anywhere in your Ordinance that would be subject to a special use permit?

[82] A Not to the best of my knowledge.

Q So the use of a special permit would not be applicable in any circumstances for a theater or adult motion picture theater?

MR. BARBER: Object to the form of the question.

A Not to the best of my knowledge.

BY MR. BURNS:

Q Now, what is the purpose of a conditional use permit?

A Conditional use permit is quite similar to a special permit in—at least in terms of its form. Although it does provide some additional latitude to allow uses that fit into more intensive district's, such as industrial districts can be moved down to less intensive districts, for instance a business district. If the nature of that specific use and its specific design is compatible with the more restrictive zoning classification.

Q And in the example that we were using, it was your testimony that this may be a possible approach in the event that it was determined that a theater use was not an appropriate use in the zone where I wanted to build it, where my client wanted to build it.

A Yes. The—it is possible under the section that I have just discussed to apply under that provision to [83] move, say, a use allowed in a light industrial zone down to a B-1 zone based upon its specific design. And if your contention is it is not specified anywhere in the code, I am not sure that section would apply. I would have to think about it.

Q Okay. So if I understand what you're telling me, that's really moving a specified use, the conditional use permit is used for moving a specified use from one zone to a less intensive zone.

A Less intensive but more restrictive.

Q Okay. Now, what is the use of the variance as that term is used in your zoning code?

A The variance is intended to provide for the modification of specified standards. It is not appropriate for modifying use. Variance is—there is no variance to a use. But there are variances to specified standards within the Ordinance such as height, setback, parking requirements and so on.

Q In your experience as an enforcer of the zoning code of the City of Renton, have you ever come upon occasions where somebody has wanted to put in a use or put a property to a use that was not covered by your zoning code?

A Yes.

Q And what procedures did you follow in arriving at an [84] administrative determination as to whether—as to what you do?

A What we have requested in every case that I am aware of is a letter from the proponent illustrating what the use is that they are intending, trying to give us as much detail as possible as to its nature, character extent,

and we compare that to all of the standards applicable to each zoning classification. Once we have determined whether a use fits or doesn't fit, within a particular zone, we respond in writing as to our conclusion and indicate whether we either found that it was appropriate or inappropriate. And establish that if they—if the proponent found the use or our determination inappropriate in their case, that they do have appeal rights to the hearing examiner for consideration.

Q In all those instances, did you designate to them which zone their intended use would be appropriate?

A To the best of my knowledge.

Q Or—well, in the context of those cases that you have worked on of that nature, have they requested the use be in a particular area?

A Let me give you an example.

Q Okay.

A Typical case is a machine shop. Machine shops—now [85] maybe that's not a perfect example, but it is close enough. Machine shop in a business zone. Typically a machine shop would not be appropriate in a business zone. It is basically a light industrial use. The applicant may be able to provide us with specific information about the nature of this machine shop that it is of such a scale that it is appropriate in the B-1 zone, very little in the way of mechanical equipment and it does not fit in the L-1 zone but appropriate in a B-1 zone and we would so indicate. On the other hand, we might conclude that no, the use you propose based upon the description that you have given us is still a light industrial use and should be located in a light industrial zone.

Q In the example you have given, is a machine shop use a use that's not covered anywhere in your zoning code?

A I was trying to recall after I gave it as an example. No, it is not specifically set forth, although there is a section that would be somewhat analogous in a light manufacturing use, using power of specified quantity.

Q In terms of making these decisions, are—when a use is not a specified use, is there—are there any written criteria, any objective guidelines that you go upon—that you rely upon to make your decision [86] or do you rely upon an evaluation, a subjective evaluation of the contemplated use and the surrounding businesses?

A Primarily the criteria that we would look at is the similarity to similar uses in the code that are specified in the code and good professional judgment. That's what we are trained for and paid to do.

Q And when you say good professional judgment, what factors are you applying?

A Typical health, safety and welfare concepts, the general intensity of the use, principle that would suggest whether a use does or doesn't affect adjoining uses, so on. Noise as an example.

Q Are the procedures for obtaining a conditional use permit those that are contained within this Chapter 30 or Section 30 of Chapter 4?

A I believe the standards for application—it is a combination of Section 4-722 capital letter F, and Chapter 30 of Title 4. We have prepared written procedures that we would make available to any applicant for a conditional use permit.

Q What are these written procedures that you have, what do they consist of?

A They would specify the number of copies of the application, affidavits of ownership, number of [87] copies of plans and what those plans should consist of.

Q Are there any written criteria or objective standards that are used or applied by the hearing examiner in reaching his decision that are contained anywhere other than in the words of the Ordinance in 720—4-722(F) and in Chapter 30 of or Section 30 of Chapter 4?

A The—in addition to the criteria specified in both of those locations, the City's comprehensive plan documents would also apply as outgrowths of sections already specified here in the Ordinance itself.

Q In particular, which sections of the comprehensive plan?

A The comprehensive plan consists of a number of elements. The land use plan is the map which you have previously discussed here today. There is language setting forth goals and policies which were adopted originally in 1965 and supplemented in 1980, which would be utilized by the examiner in his review. Depending on the specific type of use, he might also review utility or transportation sections of the comprehensive plan.

Q In particular, if we had—if the hearing examiner was considering a conditional use permit application [88] relative to a motion picture theater or an adult motion picture theater, can you tell me which portions of the comprehensive plan would be applicable?

A The—under the assumption that a conditional use permit application would be required, I would assume that he would primarily look to the adopted policies of the comprehensive plan, those are broken into somewhere between 12 and 15 sections dealing with everything from residential uses to the environment and a number of other issues. I would think that the policies element of the document would be where he would seek guidance.

Q The goals and policies of—section of the documents?

A That's correct.

Q Comprehensive plan available to anyone who wants a copy of it?

A Yes.

Q Is there anything else that the hearing examiner would look to for guidance in making a decision other than the three areas that we have now identified, Section 4-722(F), Chapter 30 of—Section 4 and the goals and policies?

A Depending on the particular issue, he might review [89] other documents such as past precedent in the legal area, definitions either in the common terms found in the dictionary or in planning books or publications.

MR. BURNS: Mr. Clemens, I think that's all I have for today. I would like to recess for the day and continue tomorrow after I have had a chance to review these documents and hopefully we will finish up early in the morning. Is that okay with you, Counsel?

MR. KELLOGG: You bet.

* * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON

No. C 82-59 M

PLAYTIME THEATERS, INC., a Washington corporation,
and KUKIO BAY PROPERTIES, INC.,
a Washington corporation,
vs. *Plaintiff,*

THE CITY OF RENTON, and THE HONORABLE BARBARA Y.
SHINPOCH, as Mayor of the City of Renton and EARL
CLYMER, ROBERT HUGHES, NANCY MATHEWS, JOHN
REED, RANDY ROCKHILL, RICHARD STREDICKE and TOM
TRIMM, as members of the City Council of the City
of Renton; Served on DELORES A. MEAD, City Clerk
and JIM BOURASA, as Acting Chief of Police of the
City of Renton,

Defendants,

jointly and severally, in their
representative capacities only

DEPOSITION UPON ORAL EXAMINATION OF
DAVID R. CLEMENS, VOLUME II

Taken at Renton City Hall, Renton Washington

DATE TAKEN: March 4, 1982

COURT REPORTER: Peggy Mitchell, RPR

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ATTORNEY

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EXHIBITS

NO.

DESCRIPTION

MARKED

2

Map

pg. 2

[2] RENTON, WASHINGTON;
WEDNESDAY, MARCH 3, 1982
10:00 a.m.

DAVID R. CLEMENS

having been duly sworn, was examined and testified as follows:

(Exhibit No. 2 marked for identification)

EXAMINATION

BY MR. BURNS:

Q Mr. Clemens, yesterday we were using a map on the board which was a full-scale size zoning map which we had marked at the end as Exhibit No. 1. I am handing you now what's been marked as Exhibit No. 2 and which is a photocopy of a portion of Exhibit No. 1. Is that map which is now marked Exhibit No. 2 a duplicate of the map that we were using yesterday?

A It does appear to be.

Q And are the areas marked and identified by the numbers 2, 3, 4, and 5 and 6 and with the letters A through E, are those numbers and letters in the same location as they were on the map yesterday?

A They appear to be.

Q And now the areas that I have shaded in in red on this Exhibit No. 2, are those correct approximations [3] of the areas which you testified yesterday were not available for use as an adult motion picture theater?

A I think you have got it backwards. Not available?

Q Yes. That are shaded in in red.

A Oh, I'm sorry. Okay. Yes, to the best of my recollection.

Q Now, you testified yesterday that certain areas which you had previously identified as being available were no longer available; is that correct?

A Yes.

Q And those areas are marked in red on Exhibit No. 2 with the exception of this area at the bottom which has the G in it, the center of it; is that correct?

A Yes, we had previously deleted that area.

Q Now, how come these areas are no longer available?

A In rereviewing the mapped documents that we prepared in the course of preparing for the maps for the City Attorneys office which we discussed yesterday, we noted that the closing section of the Ordinance had been improperly illustrated on the maps, and as a result several properties which were previously thought to be available for adult entertainment uses had to be deleted.

Q What do you mean, the closing portions of the Ordinance had been improperly illustrated?

[4] A Paragraph B of the code section indicates that the dimensions that are specified in the Ordinance are taken to the nearest point of any parcel. So that if even a portion of a parcel is influenced by the regulations restricting adult entertainment uses, the entire parcel is encompassed by that regulation. As a result of that, several of the parcels, particularly the larger parcels which were touched, say, on the side or only a portion of the property, had to all be deleted.

Q Now, have you had a chance during the evening to review the maps that you made relative to the exact locations where an adult theater could locate?

A No, I did not review that.

Q So you are not able to add to your testimony of yesterday relative to whether or not the areas that are exhibited now on Exhibit 2 accurately describe the exact boundaries of the areas in question?

A Not any more so than yesterday.

Q Mr. Clemens, our request for production of documents, Request No. 4, asks that all information, studies or other documents in possession of the City of Renton as agents, servants and/or attorneys that show effects of adult businesses on property values in neighborhoods of the City of Renton be produced as [5] well as all

studies done by the City Planning Department in preparation or the formulation of Ordinance No. 3526. Now, yesterday I was given a packet of documents which has a label on it "Answer No. 3," and are the documents contained within this packet labeled No. 3, and I am handing you that packet of documents, do those contain all documents which are in response to No. 3 which requires all studies done by the Planning Department planning staff or used for, considered by the Planning Department or staff in preparation or formulation of ordinance No. 3526?

MR. KELLOGG: Let's go off the record for a moment. Can we recess for a second?

MR. BURNS: Sure.

(Short recess taken)

BY MR. BURNS:

Q My question, Mr. Clemens, was are those all the studies?

A The packet that you have provided to us is the answer to No. 3 to your request for production contains a number of documents, some of which I was aware of and had previously evaluated at the time of the Ordinance was prepared, and there are some other additional documents which, to the best of my recollection, I [6] had not previously seen.

Q Are there any documents that you did see prior to the adoption of the Ordinance and considered which are not in the packet?

A Not to the best of my recollection.

Q Then going—

MR. KELLOGG: Let's go off the record again, Jack.

(Discussion off the record)

A I don't recall at this time what materials was in the Planning Department's working file on this subject. Any of the documents which were in the file, as I understand it, would have been in the City Clerk's files on this issue since they are the record keepers for the City. So I can only presume that with the exception of my own personal notes on meetings or discussions that occurred, which were removed from the file as a part of the culling of our files which we do on a semiannual basis, are the only documents I can think of that would not have been included here.

Q Just your personal notes may be missing.

A Yes.

Q The first document here is a copy of the Supreme Court decision of State of Washington, *Northend Cinema vs. Seattle*. Did you consider that document [7] prior to adoption of the Ordinance?

A Yes, I did.

Q There is a review of adult theater cases by Dona N. Cloud; did you consider that document?

A Yes, I did.

Q There is a zoning and planning law report dated December 19, 1977 which discusses the United States Supreme Court, *Young vs. American Mini Theaters*; did you review that document?

A I believe that I did.

Q There is a memorandum to interested parties from Richard W. Demig, city auditor about Marysville licensing ordinance; did you review that document?

A I don't recall whether I reviewed that document specifically. I do recall discussion in the proceedings that dealt with Marysville's approach, but I don't recall specifically whether I reviewed that document.

Q When you say discussions about the proceedings, what do you mean or discussions in the proceedings?

A During the public meetings, which the Planning and Development Committee held, there were discussions of numerous cities' approaches to the regulation of adult

entertainment uses, Maryville's approaches was one of the ones that was discussed.

[8] Q This is apparently a Trial Brief of Plaintiff, *City of Des Moines vs. David W. Wilson* in Des Moines Municipal Court; did you review that document?

A I don't believe that I did.

Q There is a planning advisory services bulletin report No. 327 regulating sex businesses; did you review that document?

A I don't recall specifically that I did.

Q Off the record.

(Discussion off the record)

BY MR. BURNS:

Q The next document appears to be another copy of the December 1977 zoning and planning law report relating to *Young vs. American Mini Theaters*.

A As I indicated, I believe that I reviewed that report.

Q There appears to be a copy of Ordinance No. 105584 of the City of Seattle relating to the prohibition of adult motion picture theaters in the CG and all more intensive zones; did you review that document?

A I believe that I did.

Q There is a reprint from the Municipal Research and Service Association of Washington cities on the review of adult theater cases by Dona Cloud which I believe is duplication of a prior.

[9] A Yes, I believe I reviewed that report.

Q Appears to be a Seattle license code Ordinance 10934 which regulates adult entertainment studios; did you review that document?

A I don't recall reviewing that particular document.

Q Some sort of ordinance from the City of Jacksonville about making amendments to an ordinance for adult entertainment facilities and activities.

A I don't recall reviewing that one specifically.

Q There is an ordinance of the City of Colorado Springs regulating the establishment and separation of adult uses.

A I don't recall that—reviewing that document.

Q There is an ordinance of the City of Falls Church regulating adult bookstores and adult motion picture theaters.

A I am not positive about that one because I have relatives in that general area and the topic of that discussion had come up at a separate time, so I don't recall specifically whether I did or did not.

Q There appears to be adult entertainment business ordinance contained on three pages, but I can't identify where it came from. Maybe if you can look at that and see if you recall reviewing it?

A Appears to be from Sparks, Nevada would appear and I [10] don't recall reviewing this specific document.

Q There is an ordinance from Las Vegas, Nevada about sexually oriented businesses.

A I don't recall reviewing that.

Q There appears to be a synopsis of cases, legal cases and legal principle, relating to the control or regulation of adult businesses and/or merchandise.

A I am not positive on that document. I would guess that I probably did review that particular document, but I can't tell you for certain the date.

Q County Council of the Prince George's County Maryland, a zoning bill, did you review that document?

A I don't specifically recall reviewing that one.

Q A San Diego, California adult entertainment ordinance of some sort.

A I don't recall specifically that document.

Q And then finally there appears to be a cutout from the Seattle Times April 11, 1980, regarding adult theater owner in Des Moines suing over a community impact licensing ordinance.

A Okay. I am not certain whether I saw that document or it came up in the testimony during one of the

Planning and Development Committee meetings, and I am aware of the general content of that document.

[11] Q You aware that kind of ordinance has been found unconstitutional?

A I am not certain that I am aware of that.

MR. KELLOGG: Off the record.

(Discussion off the record)

BY MR. BURNS:

Q Now Mr. Clemens, as I recall your testimony at the hearing on a Temporary Restraining Order, you indicated that you reviewed a summary of findings and conclusions of the City of Seattle relative to the adoption of their zoning ordinance for adult theaters. Is that a fair summarization of your testimony?

A That's correct.

Q Which of these documents, if any, were you referring to?

A In particular, the synopsis of the State Supreme Court's action and the report Review of Adult Theater Cases by Dona N. Cloud, assistant corporation counsel for City of Seattle. Particularly was speaking to those two documents.

Q So you're referring to the Supreme Court decision and a discussion of legal cases by Dona Cloud relative to the propriety of regulating adult businesses; is that correct?

[12] A Yes. Her report also includes a summary of the Seattle experience.

Q Did you ever look at the studies, the underlying studies that were done by the Planning Department or the Planning Commission in the City of Seattle relative to the effects of adult businesses on residential communities?

A Not prior to the adoption of the Ordinance. Subsequently I have reviewed them as—at the request of our attorneys office and with regards to this litigation.

Q So prior to that, you have never reviewed the studies themselves or any summary or conclusion of the studies themselves other than in the context of these two documents.

A That's correct.

Q Now, I had asked and in request No. 6 for all crime reports generated by the City of Renton police department in the past five years relative to any and all crimes associated with adult businesses together with any and all crime reports relating to prostitution and assault within the City of Renton. The response that I received yesterday indicated that there were none. By that should I take it that there have been no arrests for assault or prostitution [13] within the City of Renton within the past five years?

MR. BARBER: Object to the form of the question. Also there is no foundation. If I may, Mr. Burns, I believe the response refers to your request for production of documents to the City of Renton; is that correct?

MR. BURNS: Right.

MR. BARBER: Well, our response to that request for production of documents, of course, would encompass city officials other than Mr. Clemens and without a sufficient showing of foundation that Mr. Clemens would have any knowledge in this area, I don't think his testimony would be of any probative value.

BY MR. BURNS:

Q Within the scope of your knowledge, can you tell me whether it is fair to assume from this response that there are—there have been no arrests for prostitution?

A I have no way of knowing.

Q Do you know of any arrests for prostitution?

A I don't personally know of any.

Q Do you know of any arrests for assault?

A I am not aware of any police reports.

Q Now, you testified I believe at the Temporary [14] Restraining Order hearing that you perceived two adverse effects from adult businesses located within the City of Renton, those being an increase in prostitution and assaults. Is that an accurate recollection of your testimony?

A I believe the testimony was that there would be an increase in crime generally of the two types that you have just described.

Q On what do you base your opinion that there would be an increase in crime of those types?

A To the best of my recollection, there was discussion at at least one of the policy or planning development committee meetings at which there was testimony given that crime of that type would be or could be expected with the implementation of adult entertainment land uses.

Q Did that testimony come from citizens or from a police department member?

A I do not recall specifically.

Q Did you attempt to verify in any way that adult businesses, the location of adult businesses, would lead to an increase in the crimes of prostitution and assault by checking with the police department in any localities where adult businesses are located?

A No, I did not.

[15] Q Did you check with the City of Tacoma in any way?

A No, I did not.

Q Or the City of Seattle?

A No.

Q Or the City of Bremerton?

A No.

Q City of Pascoe?

A No.

Q City of Spokane?

A No.

Q So the Planning Department, through you, did nothing to verify or substantiate the assertion that someone made at a policy and planning committee meeting that

the location of adult businesses in the City of Renton would lead to increase in the crimes of assault and prostitution.

MR. BARBER: Object to the form of that question.

A The only independent verification that we did was the review of some of the documents that we have already discussed, and to the best of my recollection at this point, there was discussion of increased crime activity that could be expected to be related to that type of use.

[16] BY MR. BURNS:

Q Which documents did you review which indicated that?

MR. BARBER: Can we take a recess for a few minutes while Mr. Clemens reads those through?

(Short recess taken)

A The two places that the—first the State Supreme Court's synopsis and the synopsis from the Seattle city attorneys office, both indicate that the planning or the department of community developments report to the Planning Commission and ultimately the City Council suggested there would be an increase in crime with those types of uses. And I relied on that information.

BY MR. BURNS:

Q You also indicated that you had discussions with somebody. Who did you discuss it with?

A I don't recall any discussions prior to the Ordinance. I have subsequently had discussions with the City of Seattle.

Q But nothing prior to the Ordinance.

A Not to the best of my recollection.

Q So the only thing that you relied on there would be an increase of the crimes of assault and prostitution is the comments in the *Northend Cinema vs. Seattle* case?

[17] A That's correct.

Q Now, I think you also testified that there was some concern that there would be an adverse effect on property values. Is that correct?

A That's correct.

Q Did you contact any businesses that were located next to adult businesses anywhere in the State of Washington to determine whether there had been an adverse effect on property values?

A No, I did not.

Q On what did you base your conclusion that there would be an adverse effect on property values?

A Specifically, again, the same documents related to the Northend Cinema case in the City of Seattle. Secondly, also some prior testimony that I had received in my position with the City of Milpitas, California related to an adult bookstore case. There was testimony given in that case that the uses in the immediate vicinity of that adult bookstore were being adversely affected by reduction in customer trade.

Q But you didn't undertake anywhere to make an examination of that fact to underlie or did you at that time in Milpitas undertake any examination to verify whether that assertion was correct or accurate?

[18] A No, sir, I did not.

Q Did you do anything here to gather any empirical evidence to establish whether that assertion that there would be an adverse effect on property values was true or accurate?

A No, sir, I did not.

Q So you relied merely upon the assertion rather than on any empirical evidence.

A That's accurate.

Q Now, are there other adult type businesses in the City of Renton other than adult motion picture theater?

A I'm not aware of even an adult motion picture theater in the City of Renton.

Q Are there bars?

A Yes, there are.

Q Taverns?

A Yes.

Q And those are businesses that are limited to persons over 21 years of age?

A I believe that's correct.

Q And do you have an estimate of how many bars and taverns there are within the City?

A I don't believe we have ever prepared an accurate count. I would certainly say there are numerous.

[19] Q When you say numerous, can you give me a rough estimate of numbers?

A Probably a dozen, give or take a dozen.

Q So anywhere from 12 to 24?

A That's possible. As I say, I don't believe we have ever done an accurate study of how many.

Q Are there any locational restrictions on bars or taverns?

A No. It is my understanding that the local municipalities are preempted by the states regulations.

Q Are there any adverse effects as a planner that you see that are associated with locating bars and taverns in any areas of the City?

A As a planning professional, I have some difficulty with bars and taverns in neighborhood shopping center types of locations. They, as a land use activity, would tend to be a use that is not similar in my view to a neighborhood commercial activity, but would be more consistent with a general business area or central business district.

Q As a planning professional, what would be your opinion as to an appropriate land use area for a motion picture theater?

A Depending upon its scale, it might be appropriate in a neighborhood shopping center, but most likely in an [20] area where more general business activities occur.

Q As a land use professional, would it be a good planning concept to locate a motion picture theater in a heavy industry area?

A In general, I wouldn't find that inconsistent with good land use practice.

Q Would you find it consistent to have a general commercial kind of project like a motion picture theater in amongst warehouses and railroad and things of that nature?

A Depending upon the specific location, it might be very appropriate. If it's on a major arterial in an industrial area, it would provide an excellent opportunity for shared use of parking, different traffic pattern usages, which would make better use of the property.

Q From a land use point of view, generally would you agree that a motion picture theater is a commercial oriented kind of business?

A Yes, I think that's a reasonable assumption.

Q From a planning point of view, where do commercial businesses tend to locate?

A Generally speaking, in areas where there is other commercial businesses generally of the same nature or intensity.

[21] Q And the purpose of locating in those areas is what?

A Compatibility of use, sharing of customer trade and traffic, activities of that type.

Q Now, the only distinction between a motion picture theater and adult motion picture theater is defined by Ordinance No. 3526 is the image on the screen, is it not?

A I believe that's the case, yes.

Q And what operational characteristics as a land use professional do you find different between an adult motion picture theater and a motion picture theater, period?

A The major difference would typically be the amount of traffic and where that traffic was coming from. Generally speaking, adult theater, because of the fact they are not extensively located throughout the general market area, would draw from a larger area than a general audience theater.

Q And on what basis do you make that conclusion that they would draw from a larger or different area than a general release theater?

A Primarily on the basis of the Northend Cinema documents, which we previously discussed, and it appears consistent in my own analysis of the availability of those types of theaters in the general market area.

[22] Q Are there any other operational characteristics of adult motion picture theater that you find different from a regular or general release motion picture theater?

A The other potential impact could be the manner in which advertising signs are utilized on the structure itself.

Q Any other operational characteristics that you find different between the two uses?

A Not that come immediately to mind.

Q Does the City of Renton have a sign code?

A Yes, it does.

Q And does that code regulate the size, kind and quality of material that can be placed on various businesses?

A Only dimensional criteria.

Q Does the City of Renton have a traffic code?

A I believe that it does.

Q And to your knowledge and belief, does the City of Renton enforce that traffic code?

A I would assume that it does, if it has one.

Q And can you identify for me now any other operational characteristics that you deem to be different between an adult motion picture theater and a general release motion picture theater, other than the two that you [23] have identified, traffic and signing?

MR. BARBER: Object; it's been asked and answered.

A I can't think of any others.

BY MR. BURNS:

Q Is topless dancing a permitted use in or permitted activity in the City of Renton?

A No, I believe it is not.

Q Didn't it used to be?

A It may have been prior to my coming to the City. I am not familiar with the—those regulations there in the police code.

Q Are massage parlors a permitted use?

A I really don't know the answer to that. It is not regulated by the zoning code, which I am familiar with.

Q Do you know if there are any massage parlors in the City?

A I frankly do not know.

Q Who is responsible for drafting this Ordinance, 3526?

A I believe that it was drafted by the City Attorneys office following the discussions which we have previously gone through.

Q At what point in this process was it drafted? Was it drafted before you got to the Planning Commission or [24] was it drafted after it was referred back to the Council by the Planning and Development Committee? At what point in time was it drafted?

A To the best of my knowledge, the Ordinance was drafted after the Planning and Development Committee's report was actually issued. I believe that was contained in one of the documents that you received.

Q I see from the minutes that I got that—apparently on March 5th or 6th of 1981, the planning development or I think that was the date, maybe it was April—on April 6th, 1981, the Planning and Development Committee report was referred to or the Planning and Development Committee made its report to the City Council. The same minutes reflect the matter was referred to Ways and Means for an ordinance. Is that the normal procedure?

A Yes, it is.

Q But I also see in those same minutes that the Ordinance had its first reading on that same day at the same Council meeting. Is an ordinance read before its been drafted?

A No. The procedure that was used there is not unusual. The—in the case in question, the Ordinance was being drafted at the direction of the Planning and Development Committee for transmittal to [25] the Ways and Means Committee concurrently with the transmittal of the committee's report to the Council, and the two were available simultaneously.

Q So the Ordinance was drafted sometime before the committee's report was made to the full Council; is that correct?

A That would be correct.

Q Did the Planning Department have any input into that Ordinance?

A Not specific input into the precise wordage of the Ordinance. We did discuss on numerous occasions with the committee what standards might be appropriate in the Ordinance.

Q Now, I have been going over the affidavit that you committed in opposition to the motion for a Temporary Restraining Order, and it says at Page 2 that "I was present at all meetings of the City Council and its Planning and Development Committee." That appears to be different than your testimony yesterday wherein you indicated that you didn't think you were at certain meetings. Based on your present recollection, were you present at all meetings of the City Council and its Planning and Development Committee?

A I believe the statement that I made yesterday is the best of my recollection is that I was not present at [26] the Council meeting where the second reading and adoption of the Ordinance occurred.

Q So it would only be that last meeting.

A Yes.

Q Now, in your capacity as acting planning director and senior planner and all those other capacities that you held, were you responsible for preparing the material that was presented to the City Council and to the Planning and Development Committee?

A It depended upon the nature of the discussion before the committee. If it was issues of planning policy and similar nature, we would typically prepare a memorandum or be prepared to discuss in the committee meeting on the floor a particular issue.

Q You have handed me a lot of reports and studies that—some of which you looked at and some of which you didn't look at. Can you tell me which of these reports and studies, if any, were actually given to members of the Planning and Development Committee?

A I frankly don't recall whether any of them were given to the committee.

Q On what did the committee then base its decision?

A The oral testimony of ourselves, the attorneys of-fice, the members of the public that spoke at the public meetings.

[27] Q Did the Council, any members of the Council, to your knowledge, receive any of these reports?

A I don't have independent knowledge of that.

Q So to your knowledge you don't know one way or another.

A I don't know either way.

Q You attended, I take it, the first City Council meeting where the first reading was had.

A That's correct.

Q And I listened to a tape of that meeting this morning. Was there, to your recollection, any discussion or report made by your planning group to the City Council relative to this Ordinance?

A Not to the best of my knowledge.

Q Did the City Council, to the best of your knowledge and recollection, consider anything other than the written report of the Planning and Development Committee?

A No to the best of my knowledge and that would be standard practice.

Q Did the City Council as a whole hear any public testimony, to the best of your recollection?

A I don't recall whether there was testimony on the floor that night or not. I know there was discussion

among the members, but whether there was independent testimony, I don't recall at this time.

[28] Q This Ordinance and all the empirical data that we have gone through here appears that this started out as an adult entertainment use Ordinance; is that correct?

A The general topic was referred originally to the planning development committee, that's correct.

Q Based on your attendance at all these meetings, how did it evolve that adult motion picture theaters were singled out for special treatment as opposed to other adult entertainment uses?

A My recollection was that as the discussion evolved, the conclusion was there were basically two types of activities which the City would have an interest in regulating. The first was theaters, the second was bookstores. And after extensive discussion among the members of the committee, the conclusion was that the adult bookstore issue would be much more difficult and much more delicate to regulate and they chose only to include adult theaters.

Q On what basis did they come to that conclusion?

A At least in part based upon the discussion provided by the City Attorneys office as it relates to the background of other cities' ability and luck in the courts.

Q Did they feel that was a general tenor of the discussion; they felt that somehow bookstores had more [29] of a first amendment protection than movie houses?

MR. BARBER: I object; calls for speculation.

A That may have been the case.

BY MR. BURNS:

Q Were any changes made to the Ordinance along the way after it was drafted?

A Not to the best of my knowledge.

Q In a memorandum submitted to the Court by counsel for the City, they have said that the interpretation of the Ordinance that adult motion picture theaters are allowed as a matter of right in the B-1 zone is a

well publicized administrative view of the City of Renton—or let me read the sentence in entirety. “That interpretation is contrary to the well publicized administrative view of the City of Renton that adult movie picture theater is a permitted use of B-1 and more intensive land use zoning classifications currently in use with the City of Renton except to the extent that the specific uses prohibited by the terms of said Ordinance” and so forth and so on. Are you aware of any well publicized administrative view of the City of Renton that adult motion—movie picture theater is a permitted use within the B-1 zone?

A That has been the contention of our department since the issue originally came up. It is, to the best of my [30] knowledge, everyone who has discussed the matter has assumed that that was the case.

Q Well, when did the issue first come up, when this litigation was started?

A No, sir.

Q It says well publicized administrative view. Has it were been publicized, this administrative view?

A It has certainly been on the Council floor at least once at the time that the Ordinance was originally adopted.

Q Would that be the meeting of April 6th where it was read for the first time?

A It could have been or it could have been prior to that. I don't recall specifically.

Q Has there ever been any press release about this?

A Not to the best of my knowledge.

Q Has it ever been publicized as you understand that term?

A I know that there were several articles in the Renton or, I'm sorry, in the Record Chronicle, the City's local paper, which discussed the topic and it may have been included in those topics, but I can't say specifically.

Q Now, I listened to a tape this morning of the meeting of April 6th, and one Council man asked the question

“is there any place where these businesses can locate,” and [31] the Mayor, I think, deferred to somebody in the Planning Department and somebody in the background said “yes.” Is that the publication that you are talking about at the Council meeting?

A It could have been.

Q Can you give me any specific or identify any specific instance where the view that an adult motion picture may locate in the B-1 and more intensive land use classification has been publicized other than what you have already described?

A No.

Q You cannot give me a specific example today?

MR. BARBER: Objection; asked and answered.

A Other than what we have already discussed.

BY MR. BURNS:

Q We talked yesterday about a determination or a hypothetical example where there was some contest as to whether or not an adult motion picture theater would be allowed in the B-1 zone, and do you recall that hypothetical discussion that we had?

A There were several. I believe that I recall it.

Q And you indicated that if there were a dispute as to an interpretation whether a use was a permitted use or not permitted use, if the applicant felt aggrieved by that dispute, with the administrative people here, he could [32] appeal that to a city hearing examiner. Do you recall that testimony?

A Yes.

Q Now, that appeal to the administrative hearing examiner would be pursuant to Chapter 30 of Title 4, if I understood your testimony?

A That's correct.

Q And the hearing examiner would exercise during that process the discretion that is vested in him to make determinations based upon the goals and policies and his

judgment of how those things relate to the particular use in question; is that correct?

A That's correct.

Q Now, those procedures provide specific procedures for the hearing examiner to follow and they set down guidelines and time periods within which he must act, isn't that correct?

A That's correct.

Q And I take it that both from that appeal of that kind of determination where there has been a dispute about an administrative interpretation and also from the denial of a conditional use permit, the appropriate appeal would then be to the City Council, is that your understanding of the zoning procedures?

A No. In the case of administrative appeal, the appeal [33] of the examiner's decision is to Superior Court.

Q Okay. Could you show me that portion of the—

A I have got it here.

Q Which section is that?

A Would be Section 4-3011 capitol letter B, Paragraph 5.

Q May I see that?

A Sure. It is this paragraph here.

Q So the appeal from the administrative determination would be to the hearing—the Superior Court.

A That's correct.

Q Now, the appeal from a denial of a conditional use, would that go to the City Council?

A To the City Council, that's correct.

Q In the provisions, these administrative provisions, is there any requirement that the City Council make the decision within a certain period of time? The applicable provision that I found, just to help you out, was 3017.

A There doesn't appear to be a specific time limit established.

MR. BARBER: Move to strike the answer on the basis it calls for a legal conclusion.

BY MR. BURNS:

Q To your knowledge, Mr. Clemens, was there anything other than the documents we have seen here today [34] considered by the Council or planning development committee, if they considered what we have seen?

A Not to the best of my knowledge.

Q Mr. Clemens, document Request No. 4 requested all information, studies or other documents relative to the effects of adult businesses on property values in neighborhoods of the City of Renton. In response, this packet of documents in an envelope entitled or with a tag on it "Answer No. 4" were produced. To the best of your knowledge, are those all the documents that would be responsive to that request?

MR. BARBER: Again, subject to the the same limitation to the City's response to the plaintiffs' request for production, which may encompass staff of the City of Renton other than Mr. Clemens.

MR. BURNS: I am presuming the City produced everything and didn't hold back at all.

MR. BARBER: The City complied with the Federal Rules of Civil Procedure.

A To the best of my knowledge, these are the documents that were presented.

BY MR. BURNS:

Q There are two packets of documents included in that response. One being a letter, one being a three-page packet which is headed by a letter dated March 4, [35] 1981, to the Renton City Council from Robert L. Anderson, accompanied by a two-page document which contains a list of names and some locations. Could you—and other notations. These two pages, which is a list of names, what is that, to your knowledge?

A To the best of my knowledge, this is a list of the persons that testified—at least it is a partial list of the persons who testified at the March 5th, 1980 meeting—

'81. I lost a year. The public meeting which was held by the Planning and Development Committee to discuss this subject.

Q Do you know who prepared that list?

A I'm not totally familiar with the handwriting, but I believe it was a member of the Council's committee.

Q That would be the planning development committee, one of the members of that committee?

A Yes, that's correct.

Q Was there a sign-in sheet for the public; is that typical procedure here in Renton?

A No, there was none and is not a typical procedure.

Q The next is a packet of notes which appears to describe in a little more detail the testimony of certain people. Are you familiar with that document, have you seen it before?

A Yes, I have.

[36] Q Who is the author of this document?

A The assistant city attorney, Mr. Kellogg.

Q And do you know when that document was prepared?

A I did not see it prepared. I can only conclude from the notes at the top it was prepared at the meeting or immediately subsequent to the meeting of March 5th, 1981 of the planning development committee.

Q Question No. 10 asks for all interdepartmental memorandums, correspondence or other communications between agents, servants, employees and/or elected or appointed officials of the City of Renton relative to Ordinance No. 3526. I am handing you a packet of documents which came from an envelope with the "Answer to No. 10" on a label on it and ask you to review that and tell me if you know of any other documents which would be responsive to this request which are not included in that packet?

MR. BARBER: Again, I reiterate the comments I made previously with regard to this request for production from the plaintiff and not items that were specif-

ically sought by way of subpoena duces tecum to Mr. Clemens.

A I am not familiar with any documents other than these.

BY MR. BURNS:

Q Mr. Clemens, the first document in this pile is a packet [37] that's headed by large letters that say "notice environmental declaration." Are you familiar with this packet of documents?

A Yes, I am.

Q What's the purpose of this packet of documents?

A The documents contained in that packet are the environmental review that was prepared by the City in response to the State Environmental Policy Act as it relates to the Ordinance in question.

Q Is it typical to do these things before or after an ordinance is enacted?

A Depending on the circumstances, they may occur either way.

Q How is it normally done?

A I would say the most frequent is probably prior to.

Q What's the process that these things have to go through to get done?

A The process involves a circulation to city departments for their review, and you will note there are checklist review sheets contained in that packet. Those review checklists, along with the original environmental checklist which is specified in the state regulations, is reviewed by the City's environmental review committee and a declaration is prepared and subsequently published.

[38] Q Is the purpose or let me ask you, what is the purpose of going through this whole procedure?

A To determine whether the action could have a significant adverse impact on the environment.

Q And is this material in the general and ordinary course of things made available to a City Council or to

any committee thereof prior to their acting so they are aware of any problems the City may foresee?

A They are certainly available as public record. They are typically not even discussed except in the case where an environmental impact statement is prepared.

Q And are these prepared according to some state law?

A Yes, they are.

Q Do you happen to know what law that is?

A I can't give you the precise quote, but it is the State Environmental Policy Act.

Q Now, if I read this right, this final declaration of nonsignificance was prepared on April 15 or reviewed on April 15th 1981, which would have been a couple of days after the enactment of Ordinance No. 3526; is that correct?

A Yes, the review date is April the 15th. I don't recall at this moment what the date of the adoption was.

Q And in going through this, I see a number of checklists [39] which you talked about or review sheets with the heading of the department that did it. And it has got a date at the top "circulated 4-15-81." Is that the date it is actually circulated?

A That would typically be the case.

Q And then down at the bottom it appears somebody signs it and dates it again?

A That would—appears to be the case, yes.

Q In the typical procedure, the date at the top, is that the—generally the date when it is first sent out and the date at the bottom is the date of action by the indicated entity or department?

A Yes. I would assume that's the case.

Q Now, what use is made of these things once, you know, say somebody comes back and they say there may be an impact or there may be something wrong. What use is made of these things?

A If there is a question that is raised during the appeal period, the examiner initially would review those documents and any testimony for and against.

Q During what sort of appeal period; how would an appeal period apply in adoption of an ordinance?

A The appeal period from any decision of the environmental review committee is 14 days from the publication of the notice that they have taken an [40] action.

Q Now, on April 15th, was Steve Munson an assistant planner with your department?

A Yes, he was.

Q And were you his supervisor at that time?

A Yes, I was.

Q And on—and he prepared the environmental checklist review sheet for the Planning Department apparently; would you agree that he did that?

A Yes, he did.

Q Now, he says in one of his conflicts that the or under heading "land use conflicts," that it appears he says "possibly may be too restrictive to be practical"; is that what he said there?

A That appears to be what is stated on this sheet, yes.

Q Was that concern by the planning—as expressed by him on the Planning Department ever brought to the attention of anyone?

A Yes, it was.

Q Whose attention was it brought to?

A The environmental review committee.

Q And who makes up the environmental review committee?

A The environmental review consists of—at that time consisted of the acting planning director, the building official and acting public works director.

[41] Q So you were on that committee?

A That's correct.

Q And did you meet to consider this comment?

A Along with all of the other comments.

Q I don't really see any other comments going through here. When did you meet?

A On I believe you stated it was the 15th of April.

Q And what discussion, if any, did you have about this comment at the environmental review committee meeting?

A We discussed the intent of the Ordinance, what its general application would be and concluded after review that the Ordinance had no significant environmental impact.

Q Did you discuss whether it was too restrictive to be practical from a land use conflicts point of view?

A I don't specifically recall whether we evaluated that precise comment.

Q Has that comment ever been evaluated?

A Yes, I believe it has.

Q When was it evaluated?

A It was evaluated in a broad sense at the time that the Ordinance was adopted and more specifically since this litigation has commenced.

Q And I take it that it is your—strike that.

Your affidavit dated January 27, 1982, at [42] the bottom of Page 3 indicates that "the testimony presented to the committee consistently noted adverse impact upon neighborhoods and businesses within the City of Renton, in the event that adult entertainment and land use was established in close proximity to schools, churches, public or quasi public buildings, businesses and residential uses or zones." What particular adverse impact was noted, if any, upon a school from the operational characteristics of an adult motion picture theater?

A To the best of my recollection, at this time, the comments that were made suggested that an adult entertainment use in the vicinity of a school could have an adverse impact on children either going or coming from school and that, secondarily, that there could be adverse impacts on the ability to teach children in that environment.

Q What adverse impacts would there be on children? How would the mere image on the screen inside the building affect children?

A As I recall the concerns, the public testimony was that the material could have an effect on the people going and coming from the theater and that as a result the children being educated could be affected.

[43] Q How?

A I am not sure that I can answer that.

Q So there was a perceived adverse impact, but you can't identify for me today exactly what that impact would be.

A I think that's correct.

Q Let me ask you the same question with respect to churches. What adverse impact would the operational characteristics of an adult motion picture theater have on churches?

A I believe that one of the characterizations made in the public testimony was that some parishioners might choose not to attend churches in the vicinity of adult motion picture theaters.

Q But would wash—was there any testimony the location of an adult theater would adversely affect the church other than some people may not want to go to church?

A To the best of my recollection, that's the gist of the testimony that was heard.

Q With respect to public or quasi public buildings, what effect, adverse effect, would the operational characteristics of an adult motion picture theater have on those kinds of uses?

A I believe in particular the comment related to public [44] parks and it followed the same general area of concern as was related to schools.

Q And you can't identify what those impacts would be, just that people were concerned.

A That's correct.

Q Is it a fair assessment of what you're telling me that the City and/or the legislative body perceived that there may be problems, but they couldn't identify what those problems were specifically, but they tried to cure them anyway?

MR. BARBER: Object to the form of the question. Misstates the testimony of the witness and calls for speculation.

MR. BURNS: You can answer, if you can.

A I don't know what was in the Council's head.

BY MR. BURNS:

Q We talked about the adverse impact on businesses, I think, property values is one adverse impact that businesses perceived; is that right?

A Yes.

Q Are there any other adverse impacts that you can describe to me today that were considered at the time the Ordinance was adopted that the operational characteristics of an adult motion picture theater would have on businesses?

[45] A I can't recall any at this time.

Q And what operational characteristics of an adult motion picture theater would adversely affect residential zones or uses?

A I believe it was the same area of concern as with schools and parks.

Q In other words, somebody perceived there may be adverse impacts but couldn't identify what those specific effects or adverse impacts would be?

A I can't restate them for you, no.

Q So there is no way for us to determine today exactly what the governmental purpose was in enacting this or what evils the government entity was trying to cure; is that accurate?

MR. BARBER: I object to the form of the question; again, calls for speculation on the part of the witness and also somewhat misstates this witness' testimony.

BY MR. BURNS:

Q Can you identify with particularity today or is there any way we can identify with particularity today the evils which this Ordinance, 3526, was aimed?

MR. BARBER: Object to this question, it is vague and ambiguous what is meant by evils.

MR. BURNS: You can answer.

[46] MR. KELLOGG: The question is over-broad, Jack, and vague.

MR. BURNS: Let him answer it. I will get an over-broad and over-vague answer.

A I don't know what the Council was specifically thinking.

BY MR. BURNS:

Q What can you identify today or is there any way we can identify today the specific adverse impacts on schools, churches, children, that the legislative entity, the Council, was trying to cure by the enactment of Ordinance No. 3526?

MR. BARBER: Object again; calls for speculation from this witness as to what the legislative body or Council had in mind.

A I don't know how I can answer it.

BY MR. BURNS:

Q Are you telling me you can't identify them?

MR. BARBER: Objection; that misstates Mr. Clemens' testimony.

A I don't know—I cannot specify what the Council was thinking.

BY MR. BURNS:

Q Is there any document that we can look to or any record that we can look to to determine the exact [47] adverse impacts of adult uses on churches, schools, children and public parks and residential zones that the Council was directing its attention to be?

A I do not know of any such document.

Q Or any record or any recording.

A Not to the best of my knowledge.

Q On Page 4 of your affidavit, you indicate that several speakers noted that adult theaters and other similar uses are not similar to other commercial activities and their impact extends beyond the limits of the immediate location. The fact that the impact of a commercial activity may extend beyond the limits of the immediate location is not an unusual occurrence, is it?

A Doesn't typically occur in a commercial area, although it could. The typical place where land use impacts extend beyond would more generally be related to more intensive uses, such as industrial uses.

Q You have a regional shopping center; the impact goes beyond the immediate location, doesn't it?

A Yes.

Q You have a general release theater like your Renton Cinemas out here, that draws from a larger area than the immediate area, doesn't it?

A Yes.

[48] Q Is that the kind of impact that you're talking about or are you talking about some other kind of impact?

A In parts, speaking to physical impacts such as traffic coming from outside of the general market area of the City of Renton, but also expressing the general concern, which we have discussed previously, about secondary effect of adult entertainment uses on other kinds of uses in the vicinity.

Q But you haven't been able to identify what those secondary effects are with any particularity, other than some concerns they may have effects; isn't that correct?

MR. BARBER: Objection.

MR. BURNS: You can answer.

MR. BARBER: To the form of the question. And misstates testimony of the witness.

A I think you better restate it. I have lost it.

MR. BURNS: Why don't it read it back, Peggy.

(Question read back)

A With the exception of the two that we previously discussed of traffic and potential for—three, I guess; traffic, potential for crime and potential adverse of signing or advertising.

[49] BY MR. BURNS:

Q So those are the three impacts that you're referring to by that sentence on Page 4 of your affidavit.

MR. BARBER: Could we specifically refer to the line, Mr. Burns?

MR. BURNS: The sentence that's on—beginning at Line 5 and ending at Line 8. "Several speakers noted,"—

A The three that I can identify at this time, based upon my recollection, would be in that general area, that's correct.

BY MR. BURNS:

Q And at Line 15, you talk about speakers commenting on the adverse impacts of adult entertainment land uses on property values within the business and residential community. I take it from the your prior testimony that you did no empirical studies, no studies of any sort, you made no investigations of any kind that would establish that adult entertainment uses do have an adverse effect on property values; is that correct?

A Other than as previously testified to or reviewed of the Seattle experience.

Q So your answer is no, you did not—none of those things other than as previously testified to?

[50] MR. BARBER: Objection as to the form of the question. Misquotes the witness.

A I believe that's correct.

BY MR. BURNS:

Q On Page 5 of your affidavit, beginning at Line 7, you say "their conclusion was the public had expressed sufficient concern in providing detailed examples of the

City of Seattle, Tacoma and other cities to conclude that adult motion picture theaters should be regulated within the City of Renton on the basis of location." What detailed examples were provided from the City of Seattle by the public?

A To the best of my recollection, one or possibly two, I don't recall precisely at this time, parties that lived in Seattle discussed with the Planning and Development Committee the background of the events that led to Seattle's regulating ordinance.

Q What specific detailed examples were provided from the City of Tacoma?

A Again, to the best of my recollection, the—at the time that our Ordinance was being drafted, the City of Tacoma was in the midst of preparing a similar ordinance and testimony was given on the occurrences in the City of Tacoma.

Q What occurrences in the City of Tacoma?

[51] A To the best of my recollection at this time, the discussion was a general background of the problems that led the City of Tacoma to consider legislation.

Q Was any testimony offered by anybody that—from the City of Tacoma about the particular problems that they were having, if any, with adult businesses?

A To the best of my knowledge, no officials of the City of Tacoma testified. There may have been persons residing in the City of Tacoma that testified.

Q Can you recall with any particularity what they may have said now about what was going on in Tacoma?

A Only to the extent that my recollection was that a general audience theater in a generally residential commercial atmosphere had been changed to an adult theater and that the neighbors and the community had expressed sufficient concern that the Tacoma City Council was reviewing the situation.

Q Was there any discussion that an adult motion picture theater had, in Tacoma, had adverse impacts on the neighborhood or the community?

A I can't specify any particular points that were raised.

Q So your recollection of what happened in Tacoma was something to the effect that people were expressing concern that the use of a particular general release [52] theater had changed from general release to adult motion picture theaters?

MR. BARBER: Object to the form of the question.

BY MR. BURNS:

Q Is that—is that a summary of your recollection today?

A As best I can recall it.

Q It says "and other cities." What other cities did they have specific detailed examples of?

A My recollection was that the City of Boston so-called combat zone was raised as a discussion issue.

Q Is there anything in writing about that?

A Nothing that I am aware of, no.

Q How was it brought up?

A My recollection was that it—one of the parties that testified included reference to the Boston experience.

Q Did any official of the City of Tacoma do anything that you know of to verify that there was any factual basis for any of the assertions that were made by anybody relative to the effects of adult uses upon churches, schools, neighborhoods, residences or anything?

A We never contacted—I never contacted the City of Tacoma, and I have no knowledge of what actions they [53] may have taken.

Q Do you know if anybody did anything to verify any of the assertions that were made relative to the effects of adult businesses?

A I don't know what others did. I did not beyond what I have already testified to.

Q And you have no knowledge of what other people may have done.

A That's correct.

Q Do you know if there is any record, based on your knowledge of the records of the City of Tacoma, of what any other person may have done?

A I have no knowledge of any occurrence in the City of Tacoma in the record system.

Q I mean the City of Renton. Do you have any knowledge of any records that exist within the City of Renton that may document what any other person did to verify or find any empirical evidence to support any of the assertions that you're talking about?

MR. BARBER: Object; it is vague. Answer.

A I have no independent knowledge of any additional information that has not been presented here.

BY MR. BURNS:

Q Line 21 of Page 5, you have "based upon the comments, recommendations and debate on the floor of the [54] committee, the City Council adopted the proposed Ordinance on April 23, 1981." What debate are you talking about, where did it occur and in front of whom did it occur?

A The Planning and Development Committee held several meetings, as I believe I testified previously, I don't recall the precise number. At each of those meetings, which was a public meeting in each case, the committee discussed both among itself and with the staff present the subject and the result of those discussions was the committee's report which you have copies of and the decision of the Council.

Q So we are clear, there is no record of those discussions or debate that exist today?

A Not to my knowledge.

Q And you have described as fully as you can your recollection of what went on at those meetings and the concerns that were expressed.

A To the best of my recollection.

Q On Page 6 of your affidavit, talking about your map here, which is exhibit or—well, talking about the map that was attached to your affidavit, you say that "as illustrated on the attached map, there is approximately 400 acres of land within the City of Renton which does not fall within the locational [55] regulations." With respect to that statement, you have now changed that to indicate that these areas on Exhibit 2 hatched in red are also not available; is that right?

A That's correct.

Q Now, you go on to say "with two exceptions the property in question is undeveloped." Could you locate on Exhibit No. 2 or describe for me where those two exceptions are?

A The two exceptions that I believe I was speaking to in that case were the Longacres Racetrack and the Boeing facility, which is not illustrated on map No. 2, but was illustrated on Exhibit No. 1 we previously discussed.

Q So it was your contention that but for the Longacres Racetrack and but for the Boeing facility, all the property was undeveloped; is that what you were saying?

A That's correct.

Q Now, you know, do you know, that there is a Cole Business Center in Area 5 of the map?

A Cole Business owns property within Area No. 5. I don't recall specifically whether they have development on that property.

Q Do you know that there is a Benaroya Business Park [56] that's been completed in Area No. 5?

A Yes.

Q So that is also a developed area.

A I do not recall specifically, but I believe the—that particular location is not within the area that the Ordinance regulations do not apply.

Q Are you—what are you telling me about Benaroya Business Park; you don't think it is located here where I am pointing within the—which is in Area 5 or that

this part of Area 5 is also not within the locational regulations?

A My recollection is that the Benaroya Business Park is not included in areas which would be allowable under the Ordinance for an adult theater.

Q Could you show me where you believe the Benaroya Business Park is on this map?

A It was approximately the point you were previously illustrating.

Q That's where I am pointing right now?

A Yes.

Q And let me—and you are saying that the Benaroya Business Park is not available for use as an adult motion picture theater?

A To the best of my recollection at this time, that's correct.

[57] Q So would we have to carve out another area within Area 5 that is not available and mark it with red hatchings in order to have this map accurately reflect the available area?

A I believe that would be a correct statement. I don't recall specifically how the parcels of the Benaroya Business Park are divided and that would have an effect on whether its entirety or only a portion is affected.

Q Have you prepared a map or any drawing that shows the Benaroya Business Park and determined whether or not it is in or out of Area 5 as an available location?

A I have prepared a map at the request of the City Attorneys office which meets the criteria of the Ordinance.

Q Is the Benaroya Business Park, based on the map that you have prepared, included or excluded from the criteria of the Ordinance, and by included or excluded I mean is it an area where you can locate an adult motion picture theater or not locate an adult motion picture theater?

A I can't state with specificity. My recollection is incomplete as to whether the entire area is deleted from

the area available for adult motion pictures, but definitely a portion is deleted.

[58] Q Would that deleted portion be encompassed within the red hatched area that I am pointing to just to the west of the letter B or would it be further to the east?

A I can't tell you where that line would be based upon my present recollection.

Q Are you telling me now, though, that there is an additional area within Area 5 that is not marked which is unavailable for use as an adult motion picture theater?

A There is—

MR. BARBER: I object on the ground it's been asked and answered.

MR. BURNS: I want to find out what—where I can put one, and I think he is telling me there is another area where I can't put one. And you people have all the answers to that and I would like to find out where it is.

A The point that I was making was that the—there may be additional area which is affected by the Ordinance. I cannot tell you with specificity at this time where that is.

BY MR. BURNS:

Q How do I find that out, Mr. Clemens, where I can and can't put an adult motion picture theater?

[59] MR. BARBER: Object. That's been asked and answered before.

A The process that we utilized was to obtain a copy of a map showing the property lines within the City of Renton, identified the zoning and uses specified in the Ordinance as being protected uses and inscribed circles around those parcels. That's the process that any planning, architectural or engineering professional could accomplish.

BY MR. BURNS:

Q If I were an unrelated party coming in off the street, unrelated to this lawsuit, and asking to locate an adult motion picture theater somewhere in the City of Renton, where can I go, would the City give me that information?

A I would say that typically we would ask the question in reverse. We would say where would you like to locate and then we would inscribe circles around the location suggested to determine whether it meets the Ordinance criteria. If it does, we would indicate so; if it does not, we would indicate it does not.

Q So if I came in and I would have to acquire sites by a process of elimination, I would have to say to you will this site work and you will tell me no, and assuming that it didn't meet the locational [60] requirements and then I would have to guess and go find another site and come back to you?

MR. BARBER: Object to the form of the question.

A Our first suggestions would be to suggest to you that you hire a land use engineering or architectural professional to evaluate the Ordinance and its criteria and locate a potential site for you, at which time we would evaluate that potential site as I had stated, starting from the site and working out rather than the reverse.

BY MR. BURNS:

Q Has the City—now, I recall the testimony in front of the City Council or I heard a tape recording of the City Council meeting of April 6th, and the question was asked by one of the City Councilmen, have you identified areas where an adult theater could locate, and the question or the answer was yes. Do you recall that happening at the meeting of April 6th?

A Yes, I do.

Q And at that time had you identified the areas where an adult motion picture theater could locate?

A We had identified the general areas that would apply, but we had not applied precision to that analysis.

[61] Q And you have now, I take it, applied precision to that analysis and that precise analysis is in the hands of your attorneys?

A That's correct.

Q And your attorneys are refusing to make that available to me or allow you to make it available to me; is that correct?

MR. BARBER: Object to that question. You don't have to answer.

MR. BURNS: Are you refusing to make it available to me, counsel.

MR. BARBER: We have already stated our objection that it is work product.

MR. KELLOGG: Counsel, he just stated how you can determine it for yourself.

MR. BURNS: We are going to try this case by guess or by golly and try to keep secrets.

BY MR. BURNS:

Q On what basis would we determine whether the Benaroya Business Park is in or out?

MR. BARBER: Object to the question. It's been answered by Mr. Clemens

MR. BURNS: I haven't asked that one yet.

BY MR. BURNS:

Q How am I suppose to determine, based on what I see on [62] this map, whether it is in or out?

MR. BARBER: Same objection.

A The process would be to identify the zoning classifications and protected uses and inscribe circles around those uses.

BY MR. BURNS:

Q Have you identified any protected uses within the areas that are marked here as including the circumference of Area 5?

A Yes.

Q And could you describe for me all those protected uses that you have found within or near that area?

A There are, I believe, more than one single-family residence and a school, I believe it is Talbot Hill Elementary School, which applies in this general area.

Q Could you locate for me on this drawing where the residences you have located are?

A I can't precisely. They are located fronting Southwest 43rd Street and the school is off the map to the east.

Q Any other protected uses that you have been able to locate in that area?

A My recollection is that there is also P-1 zoning east of the Valley Freeway, east of the map that is [63] before me, which is a protected use.

Q That's this zoning over here?

A That's correct.

Q The P-1 zoning would require a thousand foot distance from the easterly edge of Area 5, would it not?

A That's correct.

Q The residential areas included along Southwest 43rd would require a thousand feet; is that right?

A That's correct.

Q And this blue line that I am pointing to which has a terminus point of B on our map, Exhibit No. 2, is the area included within that generally encompass that thousand-foot clearance from those residences?

A I am not sure whether it is precisely scaled, but that's the general area involved.

Q Now, what of the locational requirements of the Ordinance may affect the Benaroya Business Park?

A Its proximity to the single-family residences.

Q Along Southwest 43rd?

A That's correct.

Q Now, if I read this Ordinance in Section B correctly, if any portion of the Benaroya Business Park parcel is located within a thousand feet of one of those residences, none of the parcel could be used for an adult motion picture theater?

[64] A That is correct.

Q So that would be the appropriate interpretation to apply to this Ordinance.

A That's our interpretation.

Q Have you made any determination whether any portion of parcel or of the Benaroya Business Park property is located within a thousand feet of residences?

A At least a portion of the Benaroya Business Park ownership is within a thousand feet.

Q Are you telling me that the Benaroya Business Park may be in one or more parcels?

A That may be the case.

Q And at least as to that parcel, even though it is under joint ownership and used for a common purpose, would not be able to be used for an adult motion picture theater?

A I am not sure I understand the question.

Q The Benaroya Business Park owns two parcels of land out there, the Benaroya Business Company owns two different tax assessors parcels of property out there. If—but they have constructed one project on those two parcels of land. If any part of the Benaroya Business Park which has one use on two separate assessors parcels is within the thousand-foot restriction, is the entire Benaroya Business [65] Park excluded from uses of land as an adult motion picture theater?

A We have determined that separate tax parcels would be considered separate parcels for the purposes of this Ordinance.

Q It is like pulling teeth.

* * * *

BY MR. BURNS:

Q How did you go about making this administrative determination that tax parcels is the operative criteria rather than the property parcel on which the proposed use is located?

A The only available records which the City has in its possession which establishes the ownership or salability of property are the assessor's tax [66] records, and on that basis we have used the assessor's tax parcels as parcels as defined by that Ordinance.

Q Now, could you describe for me why the area marked D is not available as use—as a potential use?

A I don't know whether the precise shape of that is correct; however, it is those uses that are within one mile or parcels, tax parcels within one mile of Talbot Hill Elementary School are eliminated.

Q If that's—and I take it Talbot Hill Elementary is out here somewhere?

A Yes.

Q Why is there this gap in here then; why doesn't it extend as deep as parcels D and C do?

A There are numerous parcels that have been separated by Burlington Northern into separate tax parcels in that area, and as I previously noted, I am not sure of the precise shape, but there are parcels which are in and some that are out of the restriction zone.

Q You go on to say in your affidavit that "most of the parcels of property within the 400 acres is appropriately zoned for adult theater use. Furthermore, pursuant to the comprehensive plan, all of the locations are designated as being appropriate for commercial activities thus paving the way for [67] rezoning of those properties which are not presently zoned for adult theater uses." Which of these properties are not presently zoned for adult theater uses?

A There may be some parcels that are currently zoned G, which is a general classification, it is a single-family zone, which are shown in the comprehensive plan for—for, I believe industrial park use that could be re-

zoned to industrial park, and industrial park zoning classification would allow any type of theater.

Q Which areas are those on the map Exhibit 2?

A The potential is there may be area within the vicinity of Area 5 and the vicinity of Area No. 2 which have G zoning potential for rezoning.

Q Within Area 5 that has potential for rezoning. Are those areas within Area 5 that you are talking about, are they presently excluded from an area where an adult motion picture theater could locate as shown by the red hatching on the map?

A I don't recall with precision at this time.

Q How do you go about getting a rezone, assuming that rezone is an avenue we would have to pursue if we found an available location?

A Application would be made to the building and zoning [68] department which would be referred to the land use hearing examiner for report and recommendation to the Council for adoption.

Q Are there any objective criteria or is there a standard that he would use or is it a subjective, discretionary determination by him?

A The criteria established in the Ordinance in my view is essentially objective criteria.

Q Is there any discretion to deny a rezone?

A Yes, I believe there would be discretion.

Q What kind of discretion, how would it operate?

A If the use was found to be in conflict with the comprehensive plan or policies of the City, the potential—there is a potential that the use could be either modified or denied.

Q If you don't like the decision of the hearing examiner, where do you go in a rezone situation?

A The appeal of a decision of the examiner on a rezone is to the City Council.

Q And once again, would the procedure apply that there is no specified time limit within which the City Council must act on a rezone appeal?

A Not to the best of my recollection.

Q There is not county-wide zoning within King County, is there?

[69] A I don't know what you mean by county-wide.

Q There isn't one zoning that applies to all of King County; each municipality and the county can zone independently, isn't that correct?

A Yes.

Q So there is no overall—well, you answered the question.

Now, you say on the last page of your affidavit that "in any event, adult entertainment uses are widely available within the City of Seattle and King County generally."

Could you describe for me the location of any adult theater within King County that is not within the City of Seattle that you're aware of?

A I am not specifically aware of any theaters outside of the City of Seattle. There are other adult entertainment uses in the general area of the Sea-Tac Airport.

Q What other kind of adult uses?

A My recollection from pieces that I have seen in the newspaper at various times suggest there were massage parlors and similar types of uses.

Q But those uses aren't regulated by your adult zoning ordinance, are they?

A No, that's correct.

[70] Q So those uses could locate within Renton; is that correct?

A Subject to any regulations that are not—that I am not familiar with that are outside the zoning regulations.

Q Let me ask you this: could a live burlesque theater locate in the City of Renton now?

A I am not sure how you define burlesque.

Q Well, let me say—let me define it for you and tell me if you can locate here. Have a stage show with ladies and/or men who came out on the stage and took off all

their clothes and performed in an artistic manner, would that be subject to any regulation of the City of Renton?

A Not any zoning regulations. I do not know of whether other regulations of the City might apply.

Q Would the location of an adult bookstore that sold videotape movies which are identical to those shown in an adult movie theater be subject to any zoning regulation of the City of Renton that would restrict their location?

A If you were speaking strictly to sale of the material, I do not believe so.

Q So I could come anywhere into the City or somebody could come anywhere into the City and open up a store [71] and sell the same sort of material that is projected onto a motion picture screen at an adult motion picture theater and they would not be subject to a zoning regulation; is that correct?

MR. BARBER: Objection; asked and answered, I believe.

A As long as we are speaking only to sale of those materials, I believe that's a correct statement.

BY MR. BURNS:

Q So could I operate a panorama parlor, a peep show place in the City of Renton and not be subject to the regulation of Ordinance 3526?

A I would need to review in detail the definitions, but my immediate reaction would be that it would not be an allowable use except as prescribed by the locational criteria of the Ordinance.

Q So I can do a lot of things in this town, but I can't show a motion picture.

MR. BARBER: Objection; it is argumentative.

MR. BURNS: I don't have any other questions. Thank you, Mr. Clemens. You have been patient with me.

(Discussion off the record)

MR. BARBER: I have just a few brief questions, Jack.

[72] EXAMINATION

BY MR. BARBER:

Q Mr. Clemens, yesterday you testified with regard to a meeting where assistant city attorney Mr. Kellogg had appeared and discussed the topic of—surrounding the Ordinance that was subsequently enacted as No. 3526. Do you recall specifically if Mr. Kellogg read from the confidential memorandum which you have reviewed before that hearing?

A I can't recall with specificity whether he did or not.

Q Do you recall if the topic that was discussed at the hearing was the same topic as discussed in the confidential memorandum?

A The topics were the same general subject matter.

Q Do you have any recollection at any time if Mr. Kellogg ever quoted at any time from that confidential memorandum that you reviewed before the meeting?

A I don't recall at this time any specific instance, no.

MR. BARBER: Nothing further.

FURTHER EXAMINATION

BY MR. BURNS:

Q Mr. Clemens, you don't recall whether he quoted or whether he didn't quote or do you recall that he [73] didn't quote?

A I don't recall specifically either way.

Q So he may have and he may not have.

A I believe that's correct.

(Discussion off the record.)

BY MR. BURNS:

Q How are you compensated by the City of Renton, Mr. Clemens; on an hourly, monthly or salary basis?

A Salary basis.

Q Are you subject to civil service or are you appointed and serve at the discretion of somebody?

A Serve at the discretion of the Mayor.

Q You are not subject to civil service?

A No, I am not.

MR. BURNS: That's all.

* * * *

No. C82-59M

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Plaintiffs,
vs.

THE CITY OF RENTON, *et al.*,
Defendants.

No. C82-263R

THE CITY OF RENTON,
a municipal corporation,
Plaintiffs,
vs.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Defendants.

**AFFIDAVIT OF DAVID R. CLEMENS
IN SUPPORT OF CITY OF RENTON'S
MOTION FOR SUMMARY JUDGMENT**

STATE OF WASHINGTON)
) SS
COUNTY OF KING)

DAVID R. CLEMENS, being first duly sworn on oath
deposes and says:

2. I have been involved with assisting the Renton City Council in its Adult Land Use Entertainment Ordinances from the start and assisted in providing information to the Council with respect to Ordinances No. 3526 and 3629. I previously appeared as a witness in the Temporary Restraining Order Hearing in this case, having been called by the Plaintiffs.

3. The City Council of the City of Renton did enact Ordinance No. 3629 on the date of May 3, 1982. A certified copy of that Ordinance is attached hereto for the Court's information.

4. Attached hereto is a one page map of the City of Renton. Shown on that map in solid colored areas are those places in the City of Renton where an Adult Entertainment Land Use would be permitted under Ordinance No. 3629, the most recent Ordinance.

5. The land contained within the solid colored areas is in all stages of development from raw land to developed, improved and occupied office space, warehouse space and industrial space.

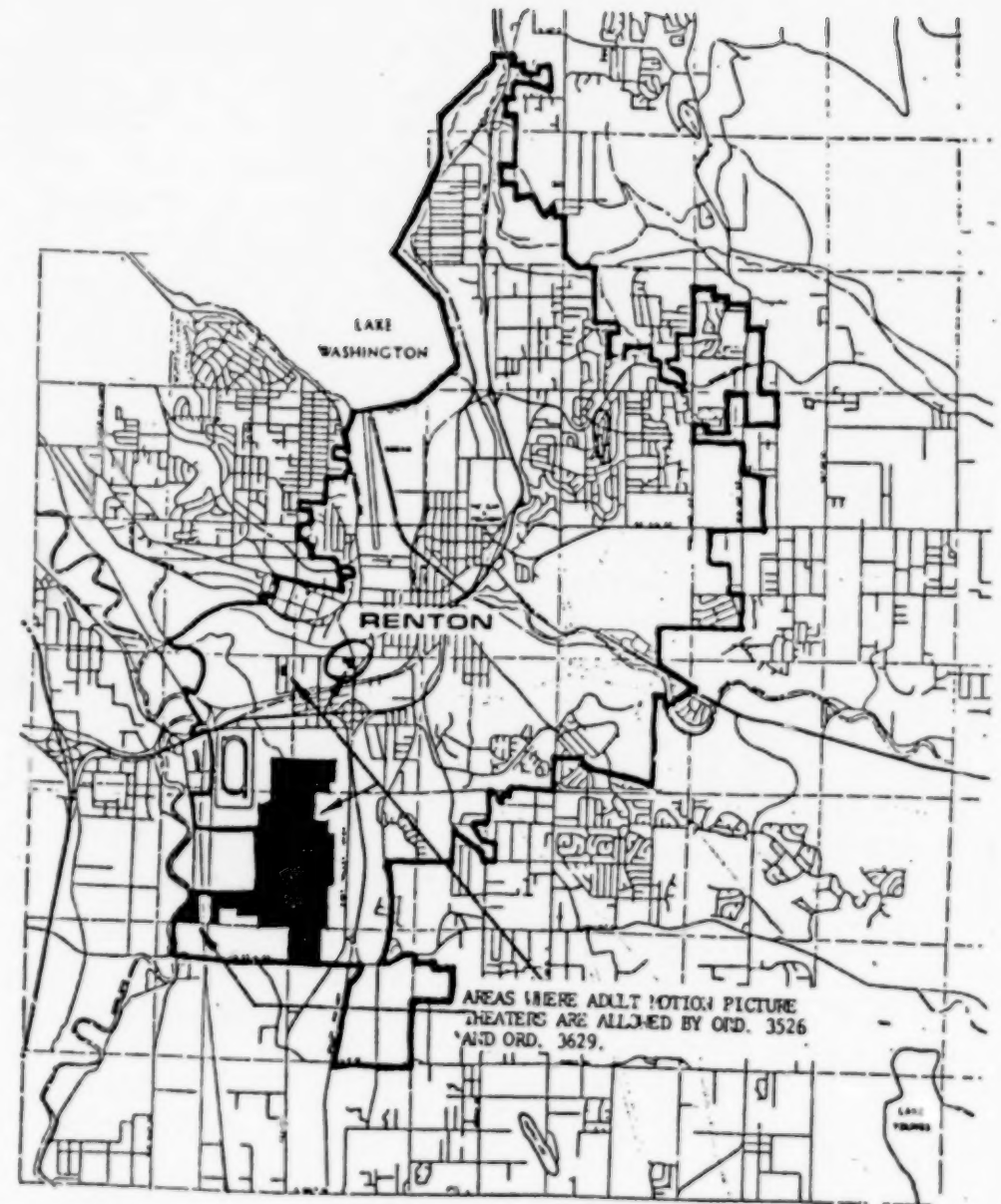
6. The total area within the solid colored areas is five hundred twenty (520) acres. Included in the 520 acres is twenty-seven (27) acres of City property, twenty-two (22) acres as a green-belt area and five (5) acres as a proposed fire station site.

7. There has been a recent Local Improvement District which extended Lind Avenue, which runs north and south through the middle of these properties. That roadway was built as a four lane major arterial. Construction is to begin soon on LID #314, which will improve freeway access and construct several east-west roads that will con-

nect in with previously developed Lind Avenue. Additionally, the City is in the midst of widening and substantially improving S.W. 43rd Street which runs along the southerly boundary of the City and provides access to most of this parcel from the Valley Freeway.

8. It should also be noted that the land in this area is serviced on the north by I-405, and on the east by SR167, the Valley Freeway. These roadways provide good access on the north, east, south and through the middle of the solid colored properties.

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

—
No. C82-59M

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Plaintiffs,

vs.

THE CITY OF RENTON, *et al.*,
Defendants.

—
**AFFIDAVIT OF BRUCE ANDERSON
IN SUPPORT OF PLAINTIFFS' MOTION
FOR A PRELIMINARY INJUNCTION**

STATE OF WASHINGTON)
) SS
COUNTY OF KING)

Bruce Anderson being first duly sworn on oath, deposes and says:

1. I am a resident of King County, Washington. I graduated from the University of Washington in 1973, after having been awarded a Bachelor of Arts Degree in English. Subsequently, I attended Gonzaga Law School and graduated in 1977 with a Juris Doctorate Degree. In 1979 I was admitted to practice law in the State of Washington. I am currently licensed as an attorney in the State of Washington, although I have never actively practiced law.

2. I am licensed by the State of Washington as an Associate Real Estate Broker and have been so licensed since 1977. Prior to that time and beginning in 1973, I was licensed by the State of Washington as an Associate Realtor. For the past four and one-half years I have been employed by Grubb & Ellis, and have worked in their commercial real estate departments within the Greater Metropolitan Seattle Geographic Area.

3. During the past four and one-half years in the employ of Grubb & Ellis, I have worked in the commercial real estate division specializing in working with developers of commercial properties. In connection therewith, it has been my responsibility to research properties to determine the availability of sites for developers and/or the availability of buildings for purchase, sale or use by a developer. In addition to actively researching the availability of properties and negotiating for the purchase of sites at the request of clients, I have done extensive research relative to the ownership of blocks and tracts of land within the City of Seattle and elsewhere in King County.

4. On February 3, 1982 I was retained by Kukio Bay Properties, Inc. and Playtime Theatres, Inc. to research the availability of property within the corporate limits of the City of Renton for use as an adult motion picture theatre. On that date, I met with Jack R. Burns, and was furnished with a map prepared by David W. Clemens which generally described the areas of the City of Renton where an adult motion picture theatre could purportedly locate. Based upon that documentation and information furnished me, I prepared a map, a copy of which is attached hereto as Exhibit "A", identifying, generally, the areas that he had described to me. From that map, I was able to identify the owners of the properties by going to a local title company and securing detailed maps of the particular areas involved and locating the owners by way of the latest King County Assessor's information. Some

of the assessor's information was outdated or did not reflect the current status of the ownership of the properties involved. By further research of subsequent sales, I was able to determine the present ownership of all properties identified within the areas marked by yellow in the attached Exhibit "A".

5. Subsequent to identifying the owners of these properties, I proceeded to contact each owner to determine the availability of their property for sale or lease for use as an adult motion picture theatre. Generally, I found that none of the property identified on Exhibit "A" is available for sale or lease. In particular, my research disclosed the following:

a. The site marked on Exhibit "A" with the number 2 is included totally within the area owned by Metro and used for a sewage disposal site. This property is intensely developed for that purpose and is much more than a garbage dump. Based upon the extensive development, expensive improvements, and the expressed public desire of Metro to expand its Renton sewage treatment plant, I concluded that this site was not available.

b. On the attached Exhibit "A", the area including Longacres and to the south, identified by the numbers 3, 4 and 4A, is also not available. This property is owned by the Washington Jockey Club, Broad Acres, Inc., and the Washington Horse Breeders Association. All of these properties are generally associated with the operation of Longacres. I spoke with Jim Anderson, the comptroller of these entities, who takes his directions from Morrie Alhadeff and, who exercises general managerial control over the Longacres complex. He indicated to me that he was authorized to speak on behalf of the owners. Longacres is currently pressed for parking space. The property, including that to the south, is not available for sale or lease and, in fact, the owners would give serious consideration to purchasing additional adjoining property if

any became available to meet their current and projected needs.

c. The area on Exhibit "A" identified by the number 6 is owned by the Jack A. Benaroya Company and has been developed as a business park. I spoke with Joel Benoliel, general counsel and secretary for Jack A. Benaroya Company, relative to the availability of his property for sale or lease for a motion picture theatre. He indicated to me that he was authorized to speak on behalf of the corporate entity. He advised me that there are seven industrial oriented buildings on the site, all of which are leased to the Boeing Company with no space available for sale or lease for any reason whatsoever. In addition, he indicated that of the Benaroya Business Parks located within the City of Renton, there is no space available for lease nor for sale.

d. The area on Exhibit "A" identified by the number 7 is part of the Koll Business Center. I spoke with Mark Niemrow, attorney and vice-president in charge of finance for the corporate entity. He indicated to me that he was authorized to speak on behalf of the corporation. He further indicated to me that the property was not available for sale or lease inasmuch as any theatre use would not comply with the covenants, conditions and restrictions imposed upon the complex.

e. On the map, the area identified by the number 9 belongs to the Sternco Land Company. I spoke with Allen Sternof, a family member and principal of Sternco Land Company. He indicated to me that he was authorized to speak on behalf of the owners; and advised me that the property is definitely not for sale.

f. The property identified on Exhibit "A" as number 10 is owned by William E. Roberts. I spoke with Mr. Roberts relative to a sale or lease of the property for an adult motion picture theatre. The property in question is currently vacant land and for sale. He indicated that

the property would not be available for a theatre location, particularly an adult motion picture theatre, inasmuch as he felt that such a use would be incompatible with current uses and projected uses of the property.

g. Attached hereto as Exhibit "B" is a map showing a section of the property indicated on Exhibit "A" which is bordered on the West by Interurban Avenue and on the East by Burlington Northern railroad tracks. Identified on this map is *site 11*. Site 11 contains approximately .33 acres of total land. This area is not large enough to locate a motion picture theatre of a reasonable size per the needs of the plaintiff, Kukio Bay Properties, Inc., which I understand to be 1 to 1 $\frac{1}{4}$ acres (see Volume I, Deposition of David R. Clemens, pages 68-69) and, thus, I did not consider this site further, other than to note that the site is currently fully developed with a warehouse facility.

h. The site identified by the number 12 on Exhibit "B". It is an owner occupied facility which is developed as a warehouse quasi-manufacturing facility and is not suitable for use as a motion picture theatre of any sort.

i. The site identified by the number 13 on Exhibit "B" is owned by Norman K. Dewey. I spoke with Mr. Dewey, who indicated to me that the property is not available for sale. The property is currently being used by the owner as a wholesale hobby and toy outlet and the space is unavailable for sale or rent in the foreseeable future.

j. The site identified by number 14 on Exhibit "B" is owned by Harold Hill and Bruce Rowe. This property is presently built out as a warehouse site and is fully occupied; and the owners indicated to me that the property as constructed is not available for sale or lease for any purpose whatsoever.

k. The site identified by number 14A on the attached Exhibit "B" is owned by the R.A. Heitz Construction Co. This site is presently built out as warehouse space and

is occupied by the owners; and no part or parcel is available for sale or lease for any reason, much less as a theatre.

l. The site identified by number 16 on Exhibit "A" is part of a larger parcel which was recently purchased by Holvick, deRegt & Koering. I was able to contact an authorized agent of their, Ed Sullivan, at his offices in Sunnyville, California, area code (408) 773-0111. Mr. Sullivan indicated to me that the property was recently purchased and is being developed as a "high tech—research and development" type of product. Smaller buildings will be constructed to be sold to R & D owner/users. He indicated to me that they were not interested in selling any of the property or leasing it for a theatre use, inasmuch as such a use would be incompatible with their development program. Any use on the property under prevailing circumstances would have to be R & D oriented.

m. The remainder of the property outlined in yellow on Exhibit "A" is generally shown by the numbers 1 and 8. This property is owned by Burlington Northern, Inc. I spoke with Dick Stafford in the real estate department of Burlington Northern, Inc. He indicated to me that he was authorized to speak on behalf of the company. He further indicated to me that corporate policy and financing dictates that all rail served sites be exclusively reserved for rail user tenants. All sites identified by the numbers 1 and 8, the bulk of the property in question, are rail served and, thus, would not be available for sale or use to a movie theatre or any kind of business catering to a retail market.

6. On June 3, 1982 counsel for Playtime Theatres and Kukio Bay Properties, Inc. gave me a map prepared by David Clemens that added additional area to the area already researched by me. Attached hereto as Exhibit "C" is an approximate outline, on a larger scale, of the

depicted area. Based upon current tax records, I determined the following:

a. The area cross-hatched on Exhibit "C" is owned by Burlington Northern, Inc. and is not available for a theatre use for the reasons set forth in paragraph 5(m) hereof.

b. The area double cross-hatched in the lower right hand corner of Exhibit "C" is part of the Koll Business Center and is not available for the reasons set forth in paragraph 5(d) hereof.

c. The area identified by the number 1 is owned by Metro Industrial District No. 1. I did not research this area further other than to note that a drainage district runs through the center of the property for its entire length which limits its usability; and further, that the property has no road access.

d. The property identified by the number 2 is owned by Mildred M. Summers and is vacant land. I could not locate Ms. Summers in the phone book or through directory assistance or other available directories.

e. The property identified by the number 3 on Exhibit "C" is owned by James F. Harper and James W. Tripp. I was able to learn that the property has been sold but was presently in foreclosure and the rights of the respective parties would not be clear until perhaps later this month. Mr. Harper indicated that they would consider selling a portion of the premises for a theatre use, but they could not state a price nor offer any assurance that they would be able to recover the property in the foreclosure proceedings. Additionally, this property does not have access from any through street.

f. The area identified by the number 4 on Exhibit "C" is owned by Mobil Oil Company and is developed with a tank farm. In my judgment, Mobil would not lease or sell this property because of the extreme difficulty and expense of relocating it. For this reason and

because of time constraints, no further investigation of this property was made.

g. The area identified by the number 5 on Exhibit "C" is owned by Martin & Howard Seelig. Howard Seelig indicated that they were not willing to sell just a portion of this 12 acre site in order to accommodate a theatre.

h. The area identified by the number 6 on Exhibit "C" is owned by the City of Renton. I was advised by counsel for the plaintiffs that during his deposition, Mr. Clemens indicated that it was unlikely that the City of Renton would agree to a use or sale of its property for use as an adult motion picture theatre. Accordingly, I did not consider this site further.

i. The area marked with the number 7 on Exhibit "C" is owned by Metro and for the reasons stated in paragraph 6(c) and 5(a), is probably not available for use as a theatre site.

7. Attached hereto as Exhibit "D" is a map on which I have approximated the remaining locations shown on the map attached to the affidavit of David Clemens dated May 26, 1982.

a. The area marked with the number 1 on Exhibit "D" is owned by Perry Brothers, Inc. and is built out as a rail-served warehouse facility and would not be suitable for a retail theatre use.

b. The area marked with the number 2 on Exhibit "D" has two ownerships. The corner piece consists of approximately 0.84 acres which is owned according to the tax records by Ray Mack, Inc., whose address is listed as a Renton post office box. I was not able to locate the owner through any available directory. This parcel is too small to accommodate the needs of the plaintiffs which is approximately 1.25 acres.

c. The remainder of the property identified on Exhibit "D" is part of an extremely large shopping center prop-

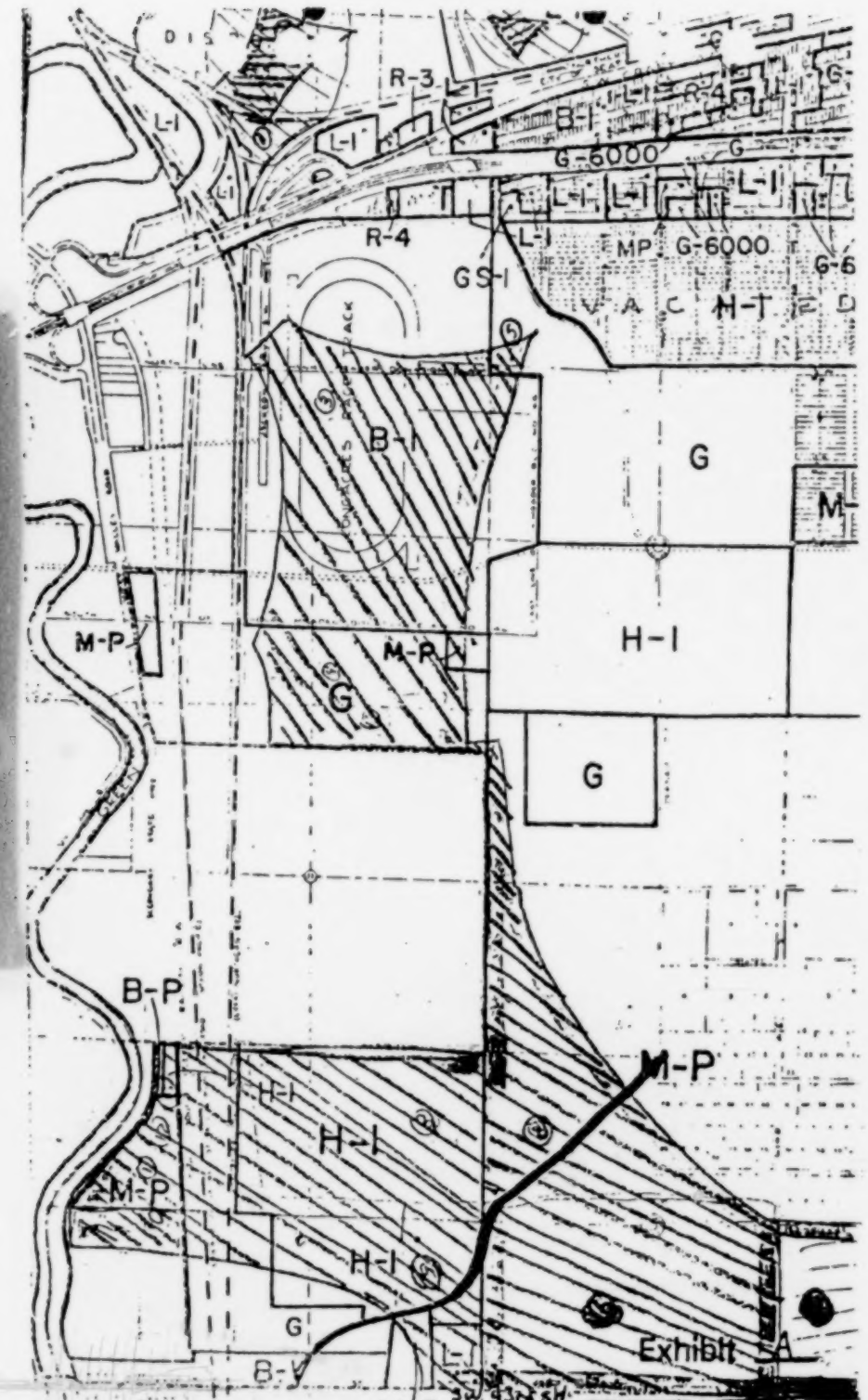
erty, whose prime tenant is a Payless Drug Center. The entire parcel is developed as a shopping center with paved parking. I was not able to locate the owner of the property who is identified in the tax records as Mission, Inc., with a Portland address.

In my experience as a real estate broker, I have never seen the owner of a developed shopping center property sell off or lease any extra parking area to an adjoining property owner. Because of changing zoning requirements for parking, any such sale or lease could potentially cripple future expansion or redevelopment of the site.

8. In my professional opinion as a real estate broker and based upon my experience and training in the commercial real estate field; and based upon my experience in attempting to negotiate for developers and purchasers for property sites that they seek to acquire from existing owners, the sites identified on Exhibits "A", "B", "C" and "D" as potential locations for an adult motion picture theatre, with the few exceptions noted, are not currently available, nor is there any reasonable likelihood that these sites will become available for such a use in the foreseeable future.

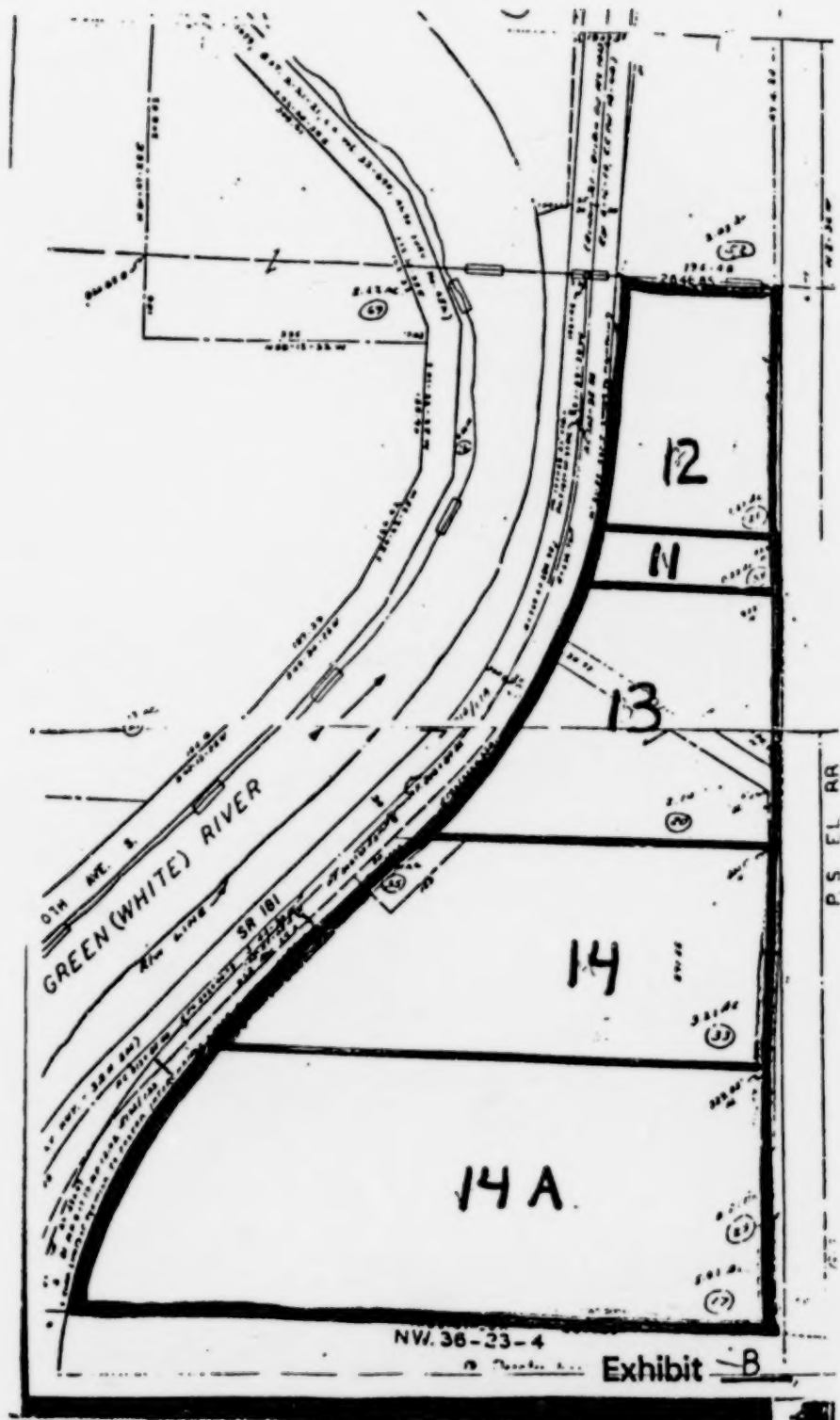
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[EXHIBIT A]

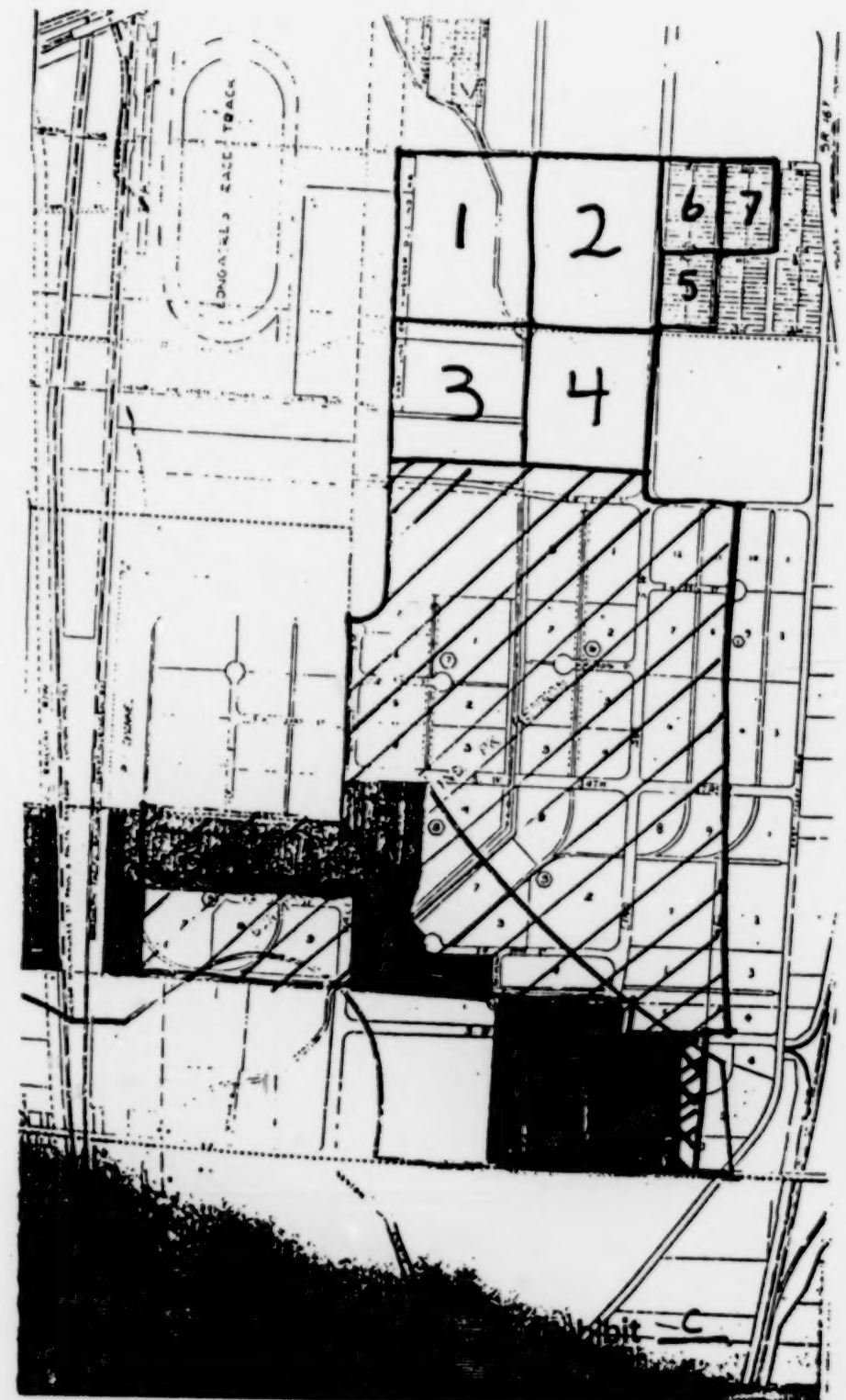


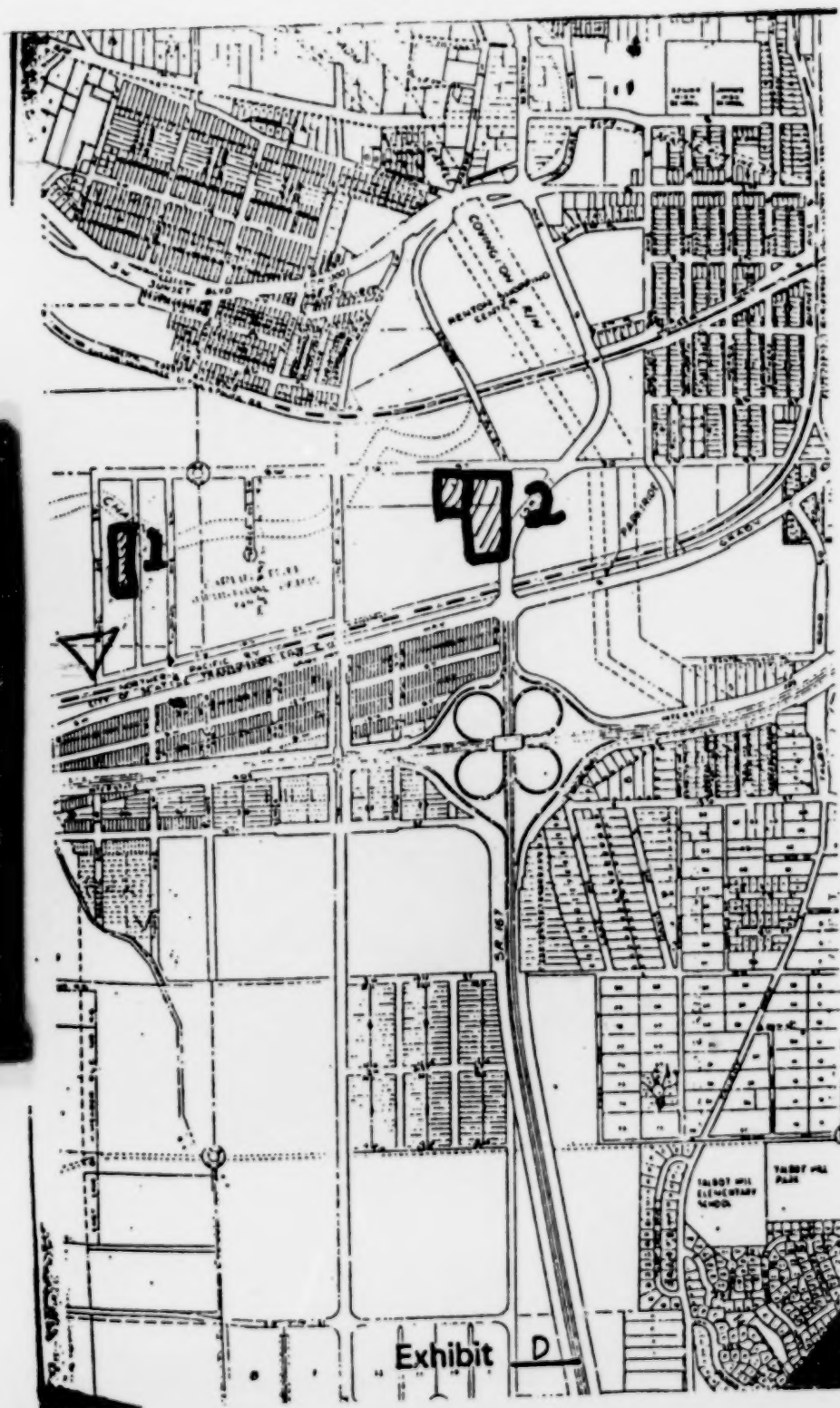
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[EXHIBIT B]



[EXHIBIT C]





No. C82-59M

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Plaintiffs,

VS.

THE CITY OF RENTON, *et al.*,
Defendants.

No. C82-263

THE CITY OF RENTON, a municipal
corporation,
Plaintiff,

VS.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Defendants.

AFFIDAVIT OF ROBERT F. BOND

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Robert F. Bond, being first duly sworn upon oath,
deposes and says:

1. I am presently employed by Sterling Recreation Organization, a Washington corporation, and have been

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so employed for the past 23 years. Sterling Recreation Organization has been engaged in the exhibition of motion picture films in the state of Washington since approximately the turn of the century. Sterling Recreation Organization presently does business in the states of Washington, Oregon, California, Arizona and Colorado, and operates general release motion picture theatres, thirteen radio stations, a number of bowling facilities, cable television facilities, and serving as landlord for many retail business establishments. Within the state of Washington, Sterling Recreation Organization has approximately 75 motion picture theatre screens devoted to the exhibition of general release motion picture film fare.

2. In connection with my employment at Sterling Recreation Organization, I am the Director of theatre operations for the state of Washington. One of my functions in that capacity is to assess the viability of proposed theatre locations for purposes of acquisition and/or expansion of existing facilities.

3. In assessing the viability of a potential theatre location, there are two primary concerns, i.e., visibility and accessibility. An ideal location involves one that is highly visible from major arterials or freeways and, in addition, is readily accessible from those arterials or freeways, once the theatre location has been identified. In conjunction with these primary factors are a number of equally important additional considerations. A theatre must be located in a people oriented environment that has regular nighttime traffic and complimentary businesses such as fast-food outlets and restaurants. A theatre location must be a place that people are willing to go in the nighttime and which provides easy parking and is generally a focal point of nighttime recreation activity.

4. Attached hereto as Exhibit 1 is a map provided to me by counsel for Playtime Theatres, Inc. and Kukio Bay Properties, Inc., which I was advised was attached to the Affidavit of David R. Clemens and which depicts those

areas within the City of Renton where an adult motion picture theatre may locate. I personally went to the City of Renton on June 11, 1982 and drove by all of the locations indicated; and observed them for purposes of testing these locations against the criteria which we use at Sterling Recreation Organization for determining a viable theatre location.

5. With the exception of the one location circled in red on Exhibit 1, all the areas shaded in black are located in warehouse areas, light manufacturing areas, rail served manufacturing warehouse areas, or business industrial park areas, which are totally unsuited for use by a retail/recreation oriented business such as a motion picture theatre. None of these areas possessed any of the qualities which we look for when seeking to locate a motion picture theatre. In fact, most of these areas were so remotely located in relation to normal arterial traffic through the City of Renton that accessibility was difficult and confusing. In addition, none of these locations was near any area enjoying even minimal nighttime activity.

6. In summary, all of the area shaded on Exhibit 1, with the exception of the area circled in red, was, based upon the criteria that we use for theatre site selection, totally unsuited for a theatre use. In those areas, I did not see any place where people would want to go to recreate.

7. The location circled in red on Exhibit 1 is presently built out with what appeared to be relatively new Burger King and Shakey's restaurants. The site itself appears to meet most of the criteria which we use for assessing the viability of a theatre location; however, its size may be too small to accommodate the parking necessary for such an operation. The physical site of the property appears only sufficient to accommodate the theatre building itself and not necessary and required parking. However, the site is bounded by the parking area of a shopping center

whose primary tenant is a Payless drug store. In order to provide sufficient parking for the theatre, it would be necessary to obtain the right to use the shopping center parking for additional or required theatre parking. It has been our experience at Sterling Recreation Organization that even if this particular site could be acquired, it is unlikely that you could work out a parking arrangement with the shopping center owner which would allow you to go forward with a theatre development on that site.

* * * *

[The map that would otherwise appear here is a duplicate of the map that is printed at JA 215 and, therefore, has been deleted.]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

—
No. C82-59M

PLAYTIME THEATRES, INC., a
Washington corporation, *et al*,
vs. *Plaintiffs*,

THE CITY OF RENTON, *et al*,
— *Defendants*.

TRANSCRIPT OF THE TESTIMONY OF JIMMY JOHNSON and DAVID R. CLEMENS, * * * had in the above-entitled and numbered cause in the above-entitled court before the Honorable PHILIP K. SWEIGERT, United States Magistrate, June 23, 1982, at the United States Courthouse, Seattle, Washington.

APPEARANCES

On behalf of the Plaintiffs:

Mr. Jack R. Burns
and
Mr. Robert E. Smith
Hubbard, Burns & Meyers
10604 N.E. 38th Place
Suite 105
Kirkland, Washington 98033

On behalf of the Defendants:

Mr. Lawrence J. Warren
and
Mr. Daniel Kellogg
Warren & Kellogg
100 S. Second St. Building
P.O. Box 626
Renton, Washington 98055

[3] PROCEEDINGS

THE CLERK: The Court calls C82-59M, Playtime Theatres, Inc., versus City of Renton.

* * * *

JIMMY JOHNSON

Called as a witness on behalf of the Plaintiffs, having been duly sworn, was examined and testified as follows:

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: My full name is Jimmy Johnson. Last name is spelled J-O-H-N-S-O-N.

DIRECT EXAMINATION

BY MR. SMITH:

Q Mr. Johnson, are you affiliated with any organization, corporation or business entity that has as its chief responsibility the acquisition of property for adult motion picture theaters?

A Yes, I am.

Q What is the name of that entity, sir?

A Walnut Properties, Inc.

Q What state is that a corporation in?

A California.

Q And, sir, where do you reside?

[4] A Los Angeles.

Q How old are you, sir?

A 32.

Q How long have you been employed in Walnut Properties?

A A little over 14 years.

Q Sir, what is your present capacity with that organization?

A I oversee theater operations and publicity and advertising for the theaters and other entities that the corporation has.

Q Now, in overseeing theater operations, what relevance does that have, if any, with the acquisition of new theater properties?

A Could you run that by me again?

Q Yes. What relevancy does the theater overseeing operations have to the acquisition of new theater properties?

A Well, the operation of theaters in watching, you know, the daily grosses and the business that you're doing is related to any new locations that we were about to acquire. We can tell, you know, what is good and what is not so good, what is bad.

Q Sir, how many theaters do you oversee at the present time?

A 33.

Q And where are they located geographically?

A From Sacramento to San Diego, California.

Q Now, how long of the 14 years you've been working for [5] Walnut Properties have you been in management?

A 12.

Q Do you have any particular educational background that qualifies you to do the kind of work you're doing?

A Other than cinema classes, no. Basically it's all been on the job training and experience, practical experience.

Q Sir, do you belong to any organizations that adult exhibitors and/or producers may belong to?

A Yes, I do.

Q And what organizations are they, sir?

A The Producers Association of Los Angeles and the Adult Film Association of America.

Q Have you ever held any office in either of those two organizations?

A Not in the Producers Association, but in the Adult Film Association I have.

Q Approximately how many members are there in the Adult Film Association?

A Approximately 300 members.

Q Composed of what, sir?

A Producers, distributors, and exhibitors of adult motion pictures.

Q Do you have occasion to have any kind of meeting with regularity?

A Yes.

[6] Q How often?

A The Producers Association, which is comprised of producers and distributors, meets once a month in Los Angeles, and the Adult Film Association meets three times a year for board of directors meeting and once a year for a convention.

Q And do you attend those meetings?

A Yes.

Q Are they all located in California?

A No. They're all over the United States.

Q And do you have any kind of work seminars and programs having to do with operation of theaters at these meetings?

A Yes. We've had seminars on operation of theaters, on advertising. Generally seminars on everything that makes up the business.

Q In connection with your work, sir, as the overseer of theater operations, do you have occasion from time to time to talk to your various attorneys concerning the operation of the business and zoning and business licenses, and such?

A Yes, I do.

Q And generally how many different attorneys do you deal with?

A Quite a few. I've talked with attorneys all over the United States regarding, you know, adult film fare and I try to keep up with, you know, zoning ordinances in the [7] state of California where it directly affects us. And so I deal with, oh, six, seven, eight, different attorneys.

Q Sir, Do either Mr. Burns or myself represent you or your organization in any way?

A No.

Q Have we ever?

A No.

Q Sir, when is it you were first contacted about the possibility of testifying in this matter?

A Approximately two weeks ago.

Q And by whom were you contacted, sir?

A I was contacted by Mr. Forbes and by yourself, Mr. Smith.

Q And what were you requested to do, sir?

A I was requested to come to Seattle and look at locations, possible locations, for adult motion picture theaters.

Q Now, sir, based on your experience and background and your dealings with other professionals involved in the operation of adult theaters, do you feel you have any sense of what it takes to locate an adult motion picture theater?

A Yes, I do.

Q Would you tell us the criteria that you perceive are relevant and important to you and to others in the business of operation of adult theaters?

[8] A There's two main factors for an adult theater or motion picture theater, and that is to be in a location that is easily accessible by major streets and in a high traffic area where you have a lot of walk-by traffic, drive-by traffic. These, I think, are the two most important factors. And to have, additionally to have other retail businesses around you that draw customers.

Q All right, sir. Now, when was the first time you saw the locations in question here in the city of Renton? We're talking now about where the theaters that are owned by Playtime, operated by Playtime are currently located.

A In March.

Q Of what year, sir?

A 1982.

Q Now, did you have occasion to do an eyeball inspection since that time?

A Yes.

Q And when was that, sir?

A That was last night.

Q Would you tell the Court briefly how much time you spent and what it was you did last evening in terms of an eyeball inspection?

A Well, I was taken last night to the locations—

Q Which locations?

A I was taken to the proposed locations where an adult [9] theater could locate in the city of Renton.

Q Was Mr. Burns with you?

A Mr. Burns was with me and Mr. Forbes was with me.

Q Mr. Burns explained to you by some showing of a map, or something, the locations where adult theaters were allowable in the current ordinances in the city of Renton?

A He did both. He showed me by map and he showed me—because we drove all around the area, and pointed each individual location out.

Q After you looked at each individual location, did you have a feel as to whether or not those areas which are zoned for an adult theater or in which an adult theater may be able to be moved, would any one of those locations be a viable entity for that kind of program?

MR. WARREN: I object to the question and the line of questioning now, Your Honor, as it now relates to an attempt to assert the rights of third parties. We're here on Renton and Roxy's Playtime Theatres complaint that they're not able to operate their theaters within the area where they want to locate them, and now they're saying, well, we're going to assert something that maybe could have happened, and it's not the question that's before the Court.

THE COURT: Well, it seems to me what he's asking is he's trying to lay foundation for [10] this gentleman's opinion as to the sites that he was shown, and so forth, and their feasibility for the purposes of adult entertainment theaters. If the question were rephrased and based

on a foundation that ties it up with the exhibit, the maps and so forth, and then ask him for his opinion, then his number of years overseeing the location of this kind of entertainment activity, I think there's probably a basis for him to give an opinion, if that's what we're getting at.

But it seems to me you can rephrase the question and ask him whether he's got an opinion and what the opinion is.

Q (By Mr. Smith) Let me ask you, Mr. Johnson: how many different geographical sites did you visit last evening?

A How many different geographical sites. I think—would this make it easy? I visited every location that was on the map outlined in green.

Q Did you go to an industrial park area?

A Yes. There were what I would consider two basic areas. There was an industrial or light manufacturing area and, then, there was another area that we went by that was developed with retail businesses.

Q Let me ask you: in addition to the criteria that you've already enunciated for us, how much land is necessary to establish a 400-seat theater including parking?

[11] A In Seattle, I do not know. I don't know what the requirements are for parking. I don't know what the ratio is, so many seats per parking space. That I would not know. But, you know, in general terms, you need a good amount of space to put in a 400-seat theater and parking.

Q Now, did you have occasion to see a location that had a Shakey's?

A Yes, I did.

Q Would you tell us about that location and why in your opinion, if in your opinion it was not viable, why not?

A Well, I saw a location with a Shakey's Pizza on it and a location with a Burger King on it. Both buildings appeared to be relatively new. They were at the edge of

a shopping center. And if those properties could be acquired and a 400-seat theater could be put in there, I would think that would be a viable location for, you know, an adult theater.

Q Was there any other location, of all the ones you looked at last evening, other than the one you just identified, which would be a viable location based on your background in your opinion?

A No, sir, not a one.

Q Would you tell us why not, sir?

A The areas that we visited, there were vacant lots, out at the edge of town. There were parcels of land with railroad [12] spurs on them. There were parcels of land with storage tanks for fuels. I assume they're for fuels. There were areas that were developed with warehouses or light manufacturing. And those were primarily the only things that were out in that area. In fact, they were the only things out in that area.

And what you would have out there is people coming into that area during the day, people who worked there everyday. At nighttime there's nobody out there. So you lose your high traffic area, you have nobody going down the street. I'm not sure that they would go out there. It was pretty dark out there at night.

And in the exhibition business you must rely on movie posters, you must rely on marquees or walk-by and drive-by traffic in addition to your advertising. That's a very important part of advertising. And out there you just don't have it.

MR. SMITH: No further questions of the witness at this time.

MR. WARREN: Your Honor, may it please the Court, may I approach the exhibits?

THE COURT: Absolutely.

[13] CROSS-EXAMINATION

BY MR. WARREN:

Q Mr. Johnson, do I understand it correctly that you've been to the locations that are shown on these two exhibits just the one time last evening?

A Yes, sir.

Q And did you note that a roadway that is in the area located at the bottom of the map was torn up?

A Yes, sir.

Q And do you have any knowledge as to whether or not that roadway carries a significant amount of traffic when it's not torn up?

A No, I wouldn't. I know that there were some, appeared to be homes, a few homes on that street.

Q Did you go down the freeway that's known as the Valley Freeway to get to this area, do you know?

A I know that we got off of a freeway and started at one end and went down the street, all the way around, and then through the area that was under construction, and, then, back around.

Q Could you not see from most of the locations that you were discussing one or both freeways that are shown on the map?

A Yes. I know that the freeways were close by.

Q With some sort of a reasonably sizable marquee, would it [14] be possible, then, for these locations to be readily identifiable as adult motion picture locations from the freeways?

A I don't know how big of a marquee you would be talking about. I imagine that it would have to be pretty big.

Q Did you also see the Renton and Roxy Theater locations?

A Yes, I did.

Q And do you have any idea what the traffic is like on the street that runs in front of those on the weekend?

A I have never seen those locations on the weekend.

Q Did you have an opportunity to view the number of shops, and so forth, on the street that were open in the evening?

A I know that there were shops in the area and there's automobile dealerships. I couldn't honestly tell you how many of the businesses were open.

Q Is the number of businesses that are open in the evening, is that not a function of how desirable a location might be?

A Yes.

Q Is not also the availability of parking a consideration?

A Very important.

Q Do you know anything about the number of parking spots that are available on site for the Renton or Roxy Theater?

A On site. I do not. I just know that there is quite a bit of parking in the surrounding area.

[15] Q You say, "Quite a bit in the surrounding area." Could you—

A There's adequate.

Q In fact, is it not the case that there's a very few parking stalls on the street itself?

A I know that there's parking on side streets.

Q And is it not true that those side streets are largely residential streets?

A The area where I parked was not in a residential area, no. There was a business there.

Q Was the parking that you utilized public parking or was it in connection with a business?

A That I'm not sure. I think it was probably parking.

Q Do you have any knowledge as to whether that public parking might be restricted at any time during the evening hours?

A I have no knowledge as to that.

Q Do you have any knowledge as to the future construction plans for any streets in the locations that you viewed that you've identified as being in the green areas?

A No, I don't. Well, no. As far as street construction, no, I don't.

Q Are you familiar at all with the locations where Mr. Forbes enterprise operates his adult motion picture theaters now?

A Yes.

[16] Q Are you aware of the location at Point Roberts?

A Point Roberts, I have not been to.

Q Do you know where Point Roberts is?

A Yes, I do.

Q Do you know the fact that it's a community with a population of around 250?

A With a tremendous drawing power in the area.

Q From where?

A From Canada.

Q And that is how long away by car, do you know?

A It's quite a ways. I think it's like a 40-minute drive, or something.

Q Does that not put that theater in doubt in your mind as to an acceptable location?

A No, it does not. That theater does fine business, as does one in Seaview.

Q Is that a high traffic area; Point Roberts?

A I know that—I have not seen it. I have not seen the location, but obviously there's a high traffic area. The people are coming from somewhere because the theater does business.

Q Is that not the point, Mr. Johnson, that people will travel to locations that are somewhat inconvenient if they wish to view this type of motion picture?

A If there's nothing in the area at night, no. Absolutely [17] nothing. And the proposed locations, I'm not sure that there were street light. There was nothing out there open. Absolutely nothing.

Q Let me ask you this question: do you know what there is at night that draws people to Point Roberts outside of this theater that is operated there?

A No, I don't.

Q Did you limit your inquiry simply to those locations that are marked in green on the two maps that are on the board?

A I'm sorry. Did I limit my inquiry—you mean, did I rely on the information that those were the only locations available?

Q Yes.

A Yes, I did. This is what I was told and those were the areas that we looked at.

MR. WARREN: That's all the questions I have, Your Honor.

MR. SMITH: May I just have a moment, Your Honor?

THE COURT: Certainly.

(Short pause in proceeding.)

[18] REDIRECT EXAMINATION

BY MR. SMITH:

Q Mr. Johnson, when you were being taken around and shown locations, you relied upon the host driving the automobile to point out the locations and telling you that these within those categories are locations where the city claims the adult theater to be located?

A Yes.

Q And you don't know whether it was just restricted to the green areas on Exhibit 8 and on the map, do you, sir?

A No. I'm simply relying on the information that was given me as to possible locations.

Q You looked at several very small locations in addition to the larger location, did you not, sir?

A Yes.

MR. SMITH: Thank you. No further questions.

MR. WARREN: Your Honor, we move to strike all of the testimony as now not being competent because we have no idea exactly what this gentleman has viewed,

the extent, the scope of it, or what he was told when he went on his view.

THE COURT: I won't strike the testimony, but I will say that the Court, on the basis of the testimony, is going to have an awfully hard time [19] figuring what he did see and what he didn't see.

I'll deny the motion.

MR. SMITH: We're willing to call Mr. Forbes who drove the car and can tell.

THE COURT: Thank you.

MR. WARREN: Your Honor, on that basis, when they call Mr. Forbes we're going to object because he was not amongst the witnesses that were listed in their denomination of witnesses, and the Court specifically said they're supposed to tell the other party who's going to testify.

THE COURT: That's absolutely correct. If he's not identified as a witness who was going to testify today, he won't testify.

MR. SMITH: But, Your Honor, on the other hand, counsel objects to the failure of the witness to be able to geographically impress on the Court the various areas, and this is something which—

THE COURT: I did not strike his testimony. His testimony stands.

MR. SMITH: I understand that. May I approach the witness, please, Your Honor.

THE COURT: Yes.

MR. SMITH: May I have this marked as an exhibit, please?

[20] THE CLERK: This will be Plaintiffs' Exhibit No. 9.

Q (By Mr. Smith) Mr. Johnson, I show you a map which has some area denoted in black on there and it says, "Areas where adult motion picture theaters are allowed by Ordinance 3526 and 3629." Do you see that, sir?

A Yes, I do.

Q Now, were you shown this map last evening?

A Yes, I was.

Q Did you cover each of the areas in black designated on that map?

A I'm sure that we did. I can only rely on my driver.

Q Were there two small areas in the northern part of the map, the larger map, that you viewed?

A Yes.

Q And you saw those two locations?

A Yes.

Q All right. And, then, you saw a larger series of locations?

A Yes.

Q And these were all covered last evening?

A Yes.

MR. SMITH: Thank you. We'll offer Exhibit 9, Your Honor, as the area covered by the visual inspection last evening by Mr. Johnson.

[21] MR. WARREN: We object to the characterization of that, Your Honor, because he couldn't identify exactly where he was either before or now.

THE COURT: To me he indicated he relied on the person he was with.

MR. WARREN: We don't have any objection to the document itself since I believe we put it in in the form of an affidavit by Mr. Clemens. So we can't object to the document itself.

THE COURT: You mean it's already in here?

MR. WARREN: It's already in here as an exhibit to Mr. Clemens' affidavit in support of our motion for summary judgment; the document they were just using.

MR. SMITH: But not as an exhibit in support of our motion for preliminary injunction, Your Honor.

THE COURT: I'll admit it for whatever it's worth.

MR. WARREN: We have no further questions of this witness, Your Honor.

THE COURT: I assume he may step down.

MR. BURNS: Yes.

[22] Your Honor, that is all the evidence we have to offer at this time.

THE COURT: All right.

MR. WARREN: Your Honor, to assist the Court in getting the exhibits in, and for the record, that the city is going to offer, we'd like to call Mr. Clemens to the stand.

THE COURT: Was he listed?

MR. WARREN: Yes.

THE COURT: All right, you can do so.

Step forward and be sworn, please.

DAVID CLEMENS

Called as a witness on behalf of the Defendants, having been duly sworn, was examined and testified as follows:

MR. WARREN: Your Honor, with the Court's permission, we'd like Mr. Clemens to carry his exhibit over to the board with him so that they could be identified from there.

THE COURT: Would you rather have him testified from there?

MR. WARREN: Largely from there, yes.

THE COURT: That's fine, unless [23] anybody has any difficulty hearing him. If you would speak up. You won't have the benefit of a mike, but nobody's been speaking into it, anyway.

THE WITNESS: I'll try, Your Honor.

DIRECT EXAMINATION

BY MR. WARREN:

Q Mr. Clemens, can you identify for the Court and explain what City's Exhibit—I believe labeled 1-A is?

THE COURT: Has it been marked as 1-A?

THE WITNESS: Yes.

THE COURT: That's backwards, but that's all right. Leave it as it is.

Q (By Mr. Warren) Could you identify the exhibit, please?

A Your Honor, the exhibit is a base map of the city of Renton at 1 inch equals 800 feet. On it identified in a red dashed line is the city limits of the city of Renton. Superimposed upon that map is a first overlay consisting of a light green, sort of a lime-colored, area which we have identified as commercial and industrially zoned property within the city of Renton.

The second overlay is a darker green color, sort of a leaf green color, that identifies the areas in which the city of Renton ordinances related to the location [24] of adult motion pictures, the areas in which adult motion picture theaters would be allowed.

On the darker green area is a dotted line surrounding two small areas which are currently zoned G-1, which is a holding classification. They are not presently zoned business or industrial. However, the comprehensive plan identifies both of these areas as being potentially zoned for those purposes.

MR. SMITH: Your Honor, we would object to any testimony and move to strike the testimony about the potential use having to do with an ordinance which is not yet in effect. We were dealing, Your Honor, with the initial ordinances passed. As Mr. Burns set out, there have been two additional ordinances, the last of which we heard about this past Monday. We're talking about an ordinance which really isn't before the Court.

THE COURT: Are these areas that are covered only by that ordinance or would they also be of the same category under the original ordinance?

THE WITNESS: This identifies the additional areas from the areas that were allowed under the original ordinance. Portions of this area, generally the southwesterly corner, were areas allowed by the original ordinance,

and the additional areas northerly were allowed by the amendments which the city council has adopted.

[25] THE COURT: Well, I'm going to hear the testimony. I have some question about its relevance, depending on whether or not you're correct and I deem you correct on the matter, that is, what is before the Court at this time, but in the interest of getting everything in the record, I'm going to go ahead and hear the testimony in any event.

Q (By Mr. Warren) Mr. Clemens, would you explain to the Court how a parcel would be included or eliminated from the dark green area on Exhibit 1-A? Excuse me, let me move on to the next exhibit that we've marked so we'll get them all identified.

A Your Honor, this is identified as Exhibit A-2.

Q Is that simply a larger view of the first exhibit?

A Yes. The map's scale in this case is 1 inch equals 400 feet rather than the prior 1 inch equals 800 feet, and it depicts the same information except that it excludes the other areas that are zoned business or industrial.

MR. WARREN: We'd offer these first two exhibits, Your Honor.

THE COURT: It excludes what?

THE WITNESS: It excludes the overlay which identifies the areas—

THE COURT: The light green?

THE WITNESS: Yes.

[26] THE COURT: It excludes the light green?

THE WITNESS: That's correct.

MR. WARREN: We would offer the first two exhibits, Your Honor.

MR. SMITH: We would object to the exhibits on the basis—

THE COURT: The same basis that you've mentioned?

MR. SMITH: Yes, Your Honor.

THE COURT: I'll admit them subject to your objection and to my rulings on that objection.

Q (By Mr. Warren) Mr. Clemens, could you now identify the third exhibit?

A Your Honor, this exhibit, it's identified as Exhibit A-3, it's an aerial photograph of the area generally in the southwest portion of the city of Renton and identified on this map is a yellow line indicating the areas in which the adult entertainment use, the adult theaters in question in this proceeding, would be allowed.

It has a green and white dashed line which identifies areas that are not presently zoned for that purpose, but comprehensively planned for that purpose.

It identifies in an orange line street improvements which the city of Renton currently has under contract [27] and it identifies with a light dashed line the city limits of the city of Renton.

MR. WARREN: We'd offer this exhibit, Your Honor.

MR. SMITH: Same objection, Your Honor.

THE COURT: All right, it will be admitted provisionally.

Q (By Mr. Warren) Mr. Clemens, the fourth exhibit?

A The last exhibit is identified as A-4. It is a aerial photograph of the downtown portion of the city of Renton. Located generally at the center of the photograph are the parcels of property on which the Renton and Roxy Theaters are located.

Also identified on the overlay are surrounding uses such as churches, single and multiple family residences, and by an orange line a distance of 1,000 feet from the Renton Theater.

MR. WARREN: We'd offer Exhibit 4.

MR. SMITH: Same objection, Your Honor.

THE COURT: Same result. It will be admitted provisionally.

MR. WARREN: Your Honor, I'm sorry [28] I misunderstood that objection. I know the Court has indicated it's provisional.

THE COURT: Does this have anything to do with the difference between the two ordinances?

MR. WARREN: No, Your Honor. It shows the location—

MR. SMITH: It certainly does.

THE COURT: Wait just a minute.

MR. WARREN: It shows the present theaters' location and the 1,000 foot prescription.

THE COURT: Didn't the original ordinance have a greater restriction?

MR. WARREN: Yes, a mile from schools.

THE COURT: Does this indicate the distance from schools?

MR. WARREN: This indicates simply the least distance that was prescribed in the ordinance, the 1,000 feet, and shows a number of uses within that area.

THE COURT: What I'm asking is—

MR. WARREN: It doesn't specifically designate how far a mile is from schools, no.

THE COURT: Would this map be the same if we were talking only about Ordinance No. 3529?

[29] MR. WARREN: In my opinion, it would be. We would have prepared it the same way.

THE COURT: Well, perhaps Mr. Clemens is the one to indicate that.

THE WITNESS: Your Honor, the only difference between this exhibit, which you see before you, and an exhibit which would identify the prescriptions of the original ordinance would be that at some point about here would be another orange line, which would identify 1 mile distance from the Renton Theater.

The scale of this aerial photograph is approximately 1 inch equals 74 feet. So that we would be a number of feet off of this photograph before we would reach 1 mile.

THE COURT: What I'm asking you is: if this exhibit had been prepared without going as far as you've indicated, would there be anything on it that would be

different if we were only talking about it in view of the enactment of 3529?

THE WITNESS: No, sir.

THE COURT: It would be identical?

THE WITNESS: I believe it would be.

THE COURT: I'll admit it, then.

MR. WARREN: Your Honor, if I may [30] approach the Clerk, we have two additional ordinances that are self-proving documents, certified copies from the city of Renton.

THE COURT: What do they deal with, counsel?

MR. WARREN: Your Honor, there is a considerable amount of the brief of the plaintiff that deals with whether or not theaters are permitted use in the business zone within the city of Renton. The first one is simply a certified copy of the building permit and additional documentation from the city of Renton with respect to a theater that is located within the business district of the city of Renton. This will be prior consistent statement and a matter of policy that the city has adopted for some time.

MR. BURNS: Your Honor, we have the zoning code in front of the Court. It provides what uses are allowed in the B-1 zones and more intensive use zones. We have Mr. Clemens' deposition testimony which has been offered as an exhibit, and Exhibit No. 6 within that deposition testimony Mr. Clemens has testified that there is no written administrative policy or guideline that exists within the city of Renton that says that a theater use of any sort is permitted within the B-1 zone. The only place that that written administrative policy [31] exists is in the pleadings of the defendants in this case.

We don't think that that rises to the dignity to show that a theater is permitted use within the B-1 zone. Mr. Clemens has testified that it is not on its face and there's no written policy. Mr. Clemens has testified that it is, but we're concerned with what the zoning ordinance says

on its face and its administrative written interpretations, if any, exist, not what they claim today.

THE COURT: I understand. I'll overrule your objection and admit it.

MR. WARREN: Your Honor, Exhibit No. A-7, I suppose, does not technically need to be admitted as it was contained in an affidavit of the City Clerk, Dale Mead, that was submitted to this Court before we brought any additional copy of our exhibit list to assist the Court in any fashion.

THE COURT: It's a part of one of the affidavits?

MR. WARREN: Yes, it is.

THE COURT: I don't see any necessity for it.

MR. WARREN: I just wanted to make sure the record was complete.

As the last exhibit, Your Honor, we have had [32] marked, and this is a document for Mr. Clemens' identification, along similar lines with Exhibit No. 5, and I would leave to Mr. Clemens to identify exactly what this document is.

THE WITNESS: Your Honor, the document is a list of uses that are not specifically identified within the B-1 zoning district which the city of Renton has issued building and business licenses for extensively throughout our business district. If you will note the preamble to the B-1 districts, which is 4-711, the district states a list of uses and other similar uses. The listing that I have prepared is a listing of uses that would fall in that general category.

MR. WARREN: We'd offer Exhibit 6, Your Honor.

MR. BURNS: Your Honor, we have the same objection with respect to this exhibit as we did to B-1. It doesn't have any probative value with respect to the ordinance on its face or has it been authoritatively construed in any sense of the word.

THE COURT: What's the exhibit number?

MR. WARREN: A-6, I believe, Your Honor.

THE COURT: A-6 will be admitted.

[33] Q (By Mr. Warren) Mr. Clemens, using your illustrative exhibits that are on the board, particularly Exhibits A-1 and A-2, if I have the numbers correct, can you explain to the Court how a parcel of land would be included or excluded from the dark green area that you have on that map?

A The methodology that was used in preparation of this map was to identify the uses listed in the ordinance and identify the distance from those uses as described in the ordinance and, if a portion of the parcel is touched by the prescribed limit, then the entire parcel is excluded. These parcels of property are parcels of property which are exclusively not touched by any of the prescribed limits in the ordinance.

Q Were there any large parcels that were touched only partially by the arc?

A Yes, there were any number of them.

Q Is there any simple administrative procedure that one could use to free up portions of those large parcels?

A Yes. A platting procedure in the state of Washington under the short plat regulations could subdivide properties to allow additional areas from those identified on the map in the dark green color.

Q Mr. Clemens, have you prepared another overlay to these two exhibits that show other properties that would be [34] available through the short plat process?

A Yes, I have.

Q Do you have that with you?

(Short pause in proceeding.)

Q (By Mr. Warren) Mr. Clemens, do you have that on the right alignment?

A I'm going to have to align it a little better, but we're getting close.

Q Now, just so the Court understands, would you explain what the red areas are?

A Your Honor, this is Exhibit No. A-2 and shown on this map as an overlay in a red color are areas that would be available for adult motion picture theaters subject to

the platting of those properties and in some cases there may be a requirement for a rezone of the properties. But there are some of the parcels of property within the general area which would be allowable with the platting procedure.

Q Mr. Clemens, this is with respect to the permissible areas for Ordinance 3526 and 3629, is that correct?

A That's correct.

Q Have you tried to do a similar analysis on just the first Ordinance 3526?

A Yes. Many of the results would be similar. There would be additional parcel areas that would be allowable by a [35] platting procedure.

THE COURT: May I ask—maybe you misspoke yourself—what number did you give as the original?

MR. WARREN: 3526.

THE COURT: Was that right?

MR. WARREN: 29, I'm sorry.

THE COURT: I thought that was 3529. Maybe we ought to rephrase the question so the record is correct.

Q (By Mr. Warren) Mr. Clemens, did you try and utilize this same procedure with respect to the permitted uses under Ordinance 3529?

A Yes, I did, and the results were somewhat similar in that there were additional parcels that were identified, or additional areas which were identified that could be available for adult motion picture theaters by platting large parcels into smaller parcels.

MR. WARREN: Your Honor, just for the record, checking our files we believe that the numbers are completely out of hand. We have the first ordinance as 3526, the second ordinance 3629, and the third ordinance, which is the one submitted by means of an affidavit previously, was 3637.

THE COURT: I think somebody may [36] have mis-spoken themselves the very first time these were mentioned. I think you may be the culprit.

MR. BURNS: I think I am. I'm looking at my brief and I see that I identified the first ordinance 3526 in my brief. So, if I misled the Court, I apologize.

THE COURT: You did. Okay, apology accepted.

Q (By Mr. Warren) Mr. Clemens, could you now bring up—excuse me, you've already got it up there—A-2, and explain to the Court the heavy blue lines on that exhibit?

A Yes. The heavy blue lines on this map illustrate freeways or major arterial streets in the general vicinity of the areas that we have identified. This large blue line here is Interstate 405 running generally in an east-west direction.

The dark blue line here running generally in a north-south direction is the Valley freeway, SR 167.

At the west is the West Valley Highway, SR1—I'd better not use the number, but it is a state highway, the West Valley Road.

At the extreme south end of the map is a major east-west roadway, S.W. 43rd, it's identified in the city of Renton. It has a designation of South 180th in the city of Kent because our city limits abut at that point.

[37] Running in a north-south direction through the center portion of the map is a major industrial arterial, Lind Avenue, and a number of east-west streets, S.W. 41st, S.W. 39th, 34th and the East Valley Road. Again, an industrial arterial.

Q With respect to the next exhibit, Exhibit A-3 that has the orange lines on it, could you explain to the Court what roads would be improved under that?

A Your Honor, the city of Renton has two major roadway improvement projects going on simultaneously. The bottom of the map, this orange line, identifies S.W. 43rd Street improvements, which is taking generally a rural two-lane, nonshouldered roadway, which has served extensive traffic exceeding 20,000 vehicles per day for a number of years, and widening it to a four and five-lane

section to provide east-west access in a more acceptable manner and bringing the levels of service down to typical urban standards.

Also you'll notice this reverse capital F shaped orange line generally along the easterly portion of the map and this is the local improvement district No. 314 which is intended to improve the East Valley Road and construct S.W. 19th and S.W. 27th providing access to a number of parcels of property.

Q Mr. Clemens, with respect to S.W. 43rd, could you explain [38] to the Court what that road serves going both east and west along it?

A The area generally to the east of this aerial photograph is predominantly residential in character, the Souss (phonetic) Creek Plateau area that abuts the south-easterly portion of the city of Renton.

Generally to the west, to the immediate west, are industrial and commercial areas of the city of Tukwila and, then, immediately beyond those the residential areas of the Highline area of King County.

Q Could you locate for the Court generally where Southcenter would be?

A Southcenter would be approximately the same distance off of the map as the distance between Valley Freeway and West Valley Road again to the west. Approximately this location.

Q Mr. Clemens, going back to the prior exhibit, if you could, could you explain to the Court the access corridors to the property that has been identified on your exhibit in green and red?

A The available access to this area comes from each of the four major directions. From the south we have access by the Valley Freeway which extends to the city of Tacoma on the south.

On the north accessing from both east and west [39] is Interstate 405.

From the southwest we have access via the West Valley Road and the extension of 180th.

Q Could you show the Court if somebody was coming along 405 in an east or westerly direction, either way, how they would get to the property that is in the green?

A If you were going to an area in the northerly portion, I would probably come down Interstate 405, take the Rainier Avenue off-ramp to the intersection of Grady Way, make two lefts, the second left being Lind Avenue, and that would place you on the major industrial corridor passing through the entire area.

If I was coming from the east, or if I was coming from the same direction I was going to the southerly end, there's an easier route and that would be to take 405 to the Valley Freeway, take the Valley Freeway south to the first exit and enter the area immediately off of the freeway off-ramp at S.W. 41st Street.

Q How about a piece of property on the very westerly portion of the green?

A A couple of alternatives. From the west there's access off of the West Valley Road via Monster Road, and from the southwest at the intersection of S.W. 43rd and West Valley Highway.

Q Could you explain to the Court, again using those same [40] roads where one would have to go to get to the Roxy and Renton Theaters at their present locations?

A The theaters in question are located in approximately this location between Morris and Smithers Avenue South and South 3rd Street, which is this top blue line on the exhibit.

From the westerly direction, the easiest interchange is the Rainier Avenue interchange with 405, northerly through a number of traffic signals to South 3rd and then easterly along South 3rd to the theaters.

Q Mr. Clemens, if one is coming down 405, could you express your opinion, from your knowledge of the area, which of the locations, either in the green area or the Roxy and Renton, is the most accessible to traffic?

A My own opinion of the traffic situation is that from the east, because of the extensive distance between the

freeway off-ramp and the downtown area, I would believe that the area shown in green is actually more accessible time wise, although it would be slightly longer in terms of overall miles distance.

Q How about coming from the west?

A From the west the access via 405 would be equal to this point. The traffic congestion moving towards the center of town would certainly be greater than extending out into the area that we've shown in the green color. I would [41] believe that from the west that access to this area would be at least equal to, if not better on a time basis. Again it would be slightly more in terms of distance.

Q Just for the Court's information, could you please locate Longacres on the map?

A Yes. Longacres is identified on the map in this oval and the words "Longacres Race Track" is identified on the map.

Q Mr. Clemens, would you relate to the Court briefly, using the aerial photograph of downtown Renton, which I believe is Exhibit A-4, could you relate to the Court now using this exhibit as an example what the parking situation is like around the Roxy and Renton?

A The parking in the vicinity of the theaters is, to the best of my knowledge, all in private ownership of the businesses or residences in the area, with the exception of on-street parking. The only parking lot available is a public parking lot of the city of Renton located on Burnett Avenue South between South 2nd and actually South 5th.

This photograph is about one year out of date and this parking lot is now complete. So the parking would be located approximately a block and a half to the east and is public parking.

Q Mr. Clemens, is there any restrictions, to the best of [42] your knowledge, on the parking on Burnett during any evening hours?

A I don't really know.

Q Mr. Clemens, with respect to the traffic in front of the Roxy and the Renton Theaters, is there any unusual circumstances that occur on the weekends?

A Yes. For a number of years the city of Renton has had what has been called the "loop" which is an area where young people have tended to congregate, drive their vehicles around the one-way street loops, which consist of South 2nd going westerly and South 3rd going easterly. The city of Renton Police Department has had considerable difficulty dealing with the traffic congestion, people parking in off-street areas in the adjoining residential neighborhoods, and so on.

Q Is there any traffic control devices utilized on the week-end if this problem becomes severe, to the best of your knowledge?

A When the problem becomes very severe, South 3rd Street is sometimes blocked at Rainier Avenue, which is just off the aerial photograph, and no traffic is allowed except local business or residential traffic.

Q And South 3rd is the street that runs in front of the two theaters in question?

A That's correct.

[43] Q Could you point out to the Court the surrounding neighborhood of the Renton and Roxy Theaters and explain some of the labels that you have attached to the exhibit?

A The most immediate adjoining uses to both the Renton and Roxy Theaters are multiple family residential apartment units. In the case of the Roxy Theater, it's in the same building. In the case of the Renton Theater, it's in an adjoining building.

The next closest uses are a church and single family residential homes to the south. Another church. Actually two more churches. St. Anthony's Elementary School and its play yard.

And to the north there's an area of a variety of commercial uses and at South 2nd Street we reach Renton High School.

Q Are all the uses you've just described within the 1,000-foot limitation you've marked on your Exhibit A-4?

A That's correct.

Q Mr. Clemens, could I have you turn again to Exhibit A-1 for just a moment. Can you point out to the Court on that exhibit, or in all of the commercial and industrial zoned property shown on the light green, where the greatest acreage within the city that is undeveloped or in development at the present time might be located within the commercial and industrial zone?

[44] A Your Honor, with the exception of relatively small parcels, the area from approximately this point northerly or easterly are primarily developed, existing commercial development of various types.

From approximately this point westerly and southerly are areas that are currently undeveloped and in the process of transition to developed uses.

Q For the record, Mr. Clemens, could you explain where you were pointing so we make sure we understand on this exhibit?

A Okay.

Q Use words rather than gestures.

A All right. Commencing at the Interstate 405 and Valley Freeway interchange, which is identified on the map, and extending a line northwesterly to the city limits, that was the demarcation line that I was illustrating with my hand.

Q Most of the property that is developable is in what direction from that line?

A To the south and west from that line.

MR. WARREN: Thank you. That's all the questions I have, Your Honor.

MR. SMITH: If it please the Court.

THE COURT: Yes.

[45] CROSS-EXAMINATION

BY MR. SMITH:

Q On this exhibit, sir, I notice a green area right up here.

A Yes.

Q What is that?

A It is a separate tax lot within the ownership of the Pacific Car and Foundry Company.

Q What does that green designation mean?

A It means that it is within the area that an adult motion picture theater would be allowed.

Q I hand you an exhibit to your affidavit. Would you tell the Court where you've designated that on the map that you attached to your affidavit?

A It apparently failed to be included on this exhibit.

Q It failed to be included on the exhibit.

MR. SMITH: This is a map that's been previously introduced. It's part of the affidavit of Mr. Clemens in support of the motion for summary judgment.

Q (By Mr. Smith) So this area is not included, correct, in this affidavit and on this map?

A That's correct.

Q Would you take this down, and I want to ask you some questions about this particular exhibit. Do you know what [46] this map is, sir? Have you ever seen it before? It's marked Exhibit 8.

A This is a map that was prepared on the instructions of city attorney to be presented to yourselves for the purposes of the—or at the instruction of the Magistrate as the result of the deposition that was held earlier this year.

MR. WARREN: Your Honor, we're going to object to any testimony on this particular exhibit for two reasons. One, it was introduced in their case, not ours, and not subject to cross-examination, and also it's outside the scope of the direct.

THE COURT: I'll let him re-open his case. Go ahead.

Q (By Mr. Smith) You prepared this, is that correct?

A That's correct.

Q What are the areas in red designated here, sir?

A The areas in red are the illustrations of the distances from the uses protected by the original zoning ordinance. Was that 3256? I believe that's correct.

Q What you're saying is that these are the areas that were allowed in which an adult theater could be located; the areas within that marked red?

A Those are the prescribed limits from the protected uses.

Q And that parallels this first exhibit, which was introduced [47] over here? Is that not correct, sir, that which is marked Exhibit No. 1?

A Yes, I believe it does.

Q This is the exhibit that was brought into court about which you testified, is that not correct?

A Yes.

Q Now, what are these green areas that have been now denoted within the red area, sir?

A Those are the areas where the prescriptions of the Ordinance 3526 would allow adult motion picture uses.

Q Didn't you testify to the Court that the green areas in this larger map were the areas where an adult theater could locate?

A Yes, sir, I did, and I was wrong.

Q You were wrong?

A That's correct.

Q So at the time you testified here against the temporary injunction, you said all these areas were areas where a theater could locate, but you were wrong?

A That's correct.

Q And now you've taken another map and have taken the same areas that you said it was okay and you've delineated those even smaller now, have you not, sir?

A That's correct.

Q At least as to this ordinance, is that correct?

[48] A That's correct.

Q And then when the affidavit that you submitted with the map, you left an area out also, is that correct?

A That is correct.

Q All right.

MR. SMITH: Your Honor, most of the questions I now will be asking will be direct, if he wants for his convenience, to return to the witness stand.

THE COURT: All right. It may be easier if you do that.

Q (By Mr. Smith) Sir, you were asked today by counsel for the city to discuss traffic problems in connection with the West 3rd Avenue area, is that correct?

A West 3rd? I'm not familiar with that street.

Q Well, the area where the Renton and Roxy are located.

A South 3rd.

Q South 3rd. Is that correct?

A Yes.

Q Were you called before the city council and asked to give that same discussion?

A We discussed traffic problems so many times, I don't know whether it was in regard to this matter.

Q Do you have any independent recollection, as you sit there, of having been called before the city council in connection [49] with the adult entertainment ordinance and discussing the traffic flow and traffic patterns and traffic problems?

A (Pause) I can't recollect specifically either way.

Q It doesn't strike you as you having done it, having appeared, does it?

A I simply can't tell you either way.

Q Okay. Now, let me ask you in connection with the police—you were asked the question whether or not when the traffic problems became very severe, did the police do anything in order to control traffic, and I think you said they blocked off part of the 3rd Street, is that correct?

A That's correct.

Q And you said it would only then let, what, business use in and residential?

A That's correct.

Q Which would mean if somebody were going to the Renton or Roxy Theater, they would be allowed into the area, is that correct?

A Yes.

Q So the blocking off of that area on weekends really doesn't have anything to do with this matter, as far as you're concerned, does it?

A It certainly would make it more circuitous because the [50] route that you would take would not be along South 3rd.

Q Well they could go through there. I mean, a potential patron could go there and just say where you're going, couldn't you?

A Yes.

Q And would be allowed through by the police, isn't that correct?

A On a different route.

Q On a different route?

A That's correct.

Q But would be allowed through?

A Yes.

Q Now, about the parking. Suppose, let's say, this was not an adult potential use and there were just two regular 35 millimeter theaters that held approximately 6 to 800 people total. Would the same problems with parking that you've identified today be in existence, sir?

A Yes, they would.

Q So that doesn't change anything, does it?

A No.

Q Were you asked to appear before the city council and tell them about the parking problems in connection with the Renton and Roxy Theaters in connection with the adoption of this order and the ordinances involved herein?

A (Pause)

[51] MR. WARREN: Your Honor, to cut this short, it appears on the exhibit that counsel has admitted previously as Exhibit 1, which is a tape of the minutes of the council hearing, he did. If it doesn't appear, he didn't.

THE COURT: Do we have all the hearings that there were on that tape?

MR. SMITH: I have what was given us, Your Honor.

MR. WARREN: Your Honor, he's asking about appearing before the council. Appearing before the full city council there are—

THE COURT: I think in connection with the adult ordinances.

MR. SMITH: Any of the ordinances herein.

THE COURT: I'll let him answer it, if he can.

THE WITNESS: Your Honor, there were a number of study sessions held by committees of the council which there was extensive discussion on a number of issues. At this point I can't recollect specifically whether that issue was discussed about those theaters. We did talk about parking problems for adult theaters.

Q (By Mr. Smith) You did talk about parking problems for [52] adult theaters?

A Yes.

Q In what context, sir?

A That adult theaters would draw traffic—or draw patrons from large areas and would need available parking.

Q Now, what studies did you undertake to do that made you qualified or give you the expertise to make that kind of statement to any of the committees?

A We reviewed the case of the *City of Seattle vs. North End Theater*, and the background that was contained in that case was primarily the basis.

Q You read the case, is that correct?

A Yes.

Q And you read a letter or sort of an opinion letter by one of the city attorneys, is that correct?

A Yes.

Q And nothing else, isn't that true?

MR. WARREN: Your Honor, I'm going to object. This is not a member of the city council and there were other people who testified that this is the sole basis of what he said or what he thought. I don't see that it's relevant.

THE COURT: Well, if we're clear we're only talking about Mr. Clemens.

[53] MR. SMITH: That's correct.

THE COURT: He can testify what he read and what he based his recommendations on. He can't, certainly, testify for everybody on the city council.

Q (By Mr. Smith) You can answer, Mr. Clemens.

A If you'd repeat the question, please?

Q Yes. Other than the *North End Cinema* case itself, published decision, and the letter from one of the city attorneys sort of summarizing the decision, did you read any other documents in connection with that case?

MR. WARREN: With respect to parking, Your Honor, or what?

MR. SMITH: Parking was the issue that I was addressing because that's the issue I think he said he had some conversation before one of the commissions.

THE COURT: You are talking about in connection with parking?

MR. SMITH: Yes, sir.

THE WITNESS: That was the material that we reviewed, yes.

Q (By Mr. Smith) And no other?

A That's all that I can recall at this time.

MR. SMITH: Excuse me, Your Honor.

[54] (Pause in proceeding.)

Q (By Mr. Smith) Sir, would you tell us by any of the exhibits that are up here which zone as a matter of

right an adult theater is permitted to locate in; as a matter of right?

A The city of Renton allows theaters to be located within the B-1 zoning classification as a matter of right.

Q As a matter of right?

A As a matter of right.

Q Now, is that a policy or is that by zoning ordinance, sir?

MR. WARREN: I object, Your Honor. The zoning ordinance is a continuing document that has—its interpretation was made by administrative determination. And, "As a matter of right," it is now a legal term that they're asking this witness to testify to and I don't think he can do that. That's up to the Court eventually.

THE COURT: I'm not going to allow him—I don't think he can testify as to whether it's a matter of right. I'll sustain the objection.

Q (By Mr. Smith) Well, sir, if somebody wanted to put a service station in the city of Renton, there are areas which you set aside by zoning for service stations?

A Yes.

Q Does it say a service station may located in this area?

[55] A I haven't looked at the B-1 district in the last couple of days, but I would guess that it does.

Q Now, is there a comparable zoning ordinance which says adult theaters can locate in this area?

A No, there is not.

Q Would you explain to the Court the difference between one that says a service station may locate in this area and the other one which does not say an adult theater can locate in this area?

A The distinction is that the ordinance says, "And other similar uses." The city of Renton hired professionals in planning and building to interpret whether "other similar uses" fall within the classifications that are prescribed.

In the case of the city of Renton's zoning ordinance, there is only one business district, the B-1 district. We have a variety of industrial districts. We have a variety of residential districts, but we have only one district prescribed for commercial uses. So as a result of that, significant weight is given to commercial uses that propose to locate within that district.

Q Would you tell me on this exhibit that you've previously identified that shows a list of the retail service or business uses allowed within the city of Renton under the provision of the B-1 zoning district, which one parallels [56] an adult theater, which of the uses that are listed here?

MR. WARREN: I'm going to object to the question, Your Honor. I don't think this witness can answer that and—

THE COURT: He prepared the exhibit. Which exhibit is that?

MR. WARREN: Exhibit A-6, I believe, Your Honor.

THE COURT: Would you hand him the exhibit?

THE WITNESS: Your Honor, the listing in this exhibit is a list of uses which are not listed in the zoning ordinance of the city of Renton, but which have been allowed by administrative doctrine both by the planning department and building department over a number of years that have located in the B-1 district.

Q (By Mr. Smith) Would you tell us which of these uses would be comparable to an adult theater?

A States as the second item from the bottom, "Theaters."

Q Do you distinguish between theaters and adult theaters in any of your zoning ordinances, sir?

A No.

Q You do not?

A No.

Q The Renton and Roxy could open tomorrow without any concern [57] about being 1,000 feet from any church or residential location, sir?

A That's correct.

Q As an adult use?

A No, sir.

Q But then there is a difference between a regular theater and an adult theater in your perception, is that not correct?

A Yes.

Q So, then, which of the uses that you detail in this exhibit would parallel an adult theater?

MR. WARREN: Your Honor, I'm objecting because he's trying to argue with the witness about the exhibit and mischaracterizes it.

THE COURT: He's already answered the question. The one that he feels is most similar is that for theaters.

Q (By Mr. Smith) Now, sir, you told us about the short plat technique of being able to get zoning approved, is that correct?

A Short platting to subdivide property into smaller parcels.

Q Would you tell us briefly in your perception how the short plat technique is going to work?

A Short platting is allowed for properties to be divided into—up to four different lots and the procedures [58] are prescribed in our subdivision ordinance requiring a public hearing before the hearing examiner, and subject to the conditions which may be established either by the subdivision ordinance or by the examiner as special conditions, the plat would be recorded and the lot would be divided.

Q What standard does the hearing examiner apply in determining whether an adult theater could do a short plat?

A We're not talking about an adult theater. We're speaking about a subdivision of land. There is never a discussion of the use of that land in a subdivision process.

Q So that whoever came and wanted to subdivide into four separate segments,—is that what it is?

A Four separate lots.

Q And there would be no requirement or no necessity of identifying one of the uses as being an adult theater use, is that correct?

A No, sir.

Q Is there anything which would stop the city council from the following week passing an ordinance making it impossible for an adult theater to locate in that area?

MR. WARREN: I'm going to object to the question because it's a legal question, Your Honor.

THE COURT: Sustained.

Q (By Mr. Smith) How many different ordinances has the city [59] council purported to pass relating to adult entertainment uses since the first of January, 1982?

MR. WARREN: If he knows, Your Honor.

THE COURT: If you know.

A I believe there have been two. I'm not positive.

Q (By Mr. Smith) And you have delineated, depending on how closely you review your maps, differing time and differing areas where you felt adult theater uses could be located, is that not correct?

A Yes. The maps that have been presented by the plaintiff are maps that were prepared as a result of the first ordinance. The maps which I have brought for today's hearing are in relationship to the most recent ordinance adopted by the city.

Q And the mistakes that appear on the ones originally, were those of your making? Is that correct?

A Yes.

Q Sir, on the areas that you've indicated—

MR. SMITH: If I may approach the board, please?

Q (By Mr. Smith) Now, is any of the area that is indicated in the green now zoned for residential use?

THE COURT: Which color green?

MR. SMITH: I'm saying of the areas [60] zoned, any green.

A The dark green color covers two areas that you'll note are slightly less green. Those are areas that are

presently zoned a G-1 classification, which is a holding residential classification.

Q (By Mr. Smith) Just residential?

A Yes.

Q So if these areas which are residential are hold, then one would have to mark or delineate a 1,000 feet from any area zoned as residential for locating an adult theater, isn't that correct?

A No.

Q Why not?

A Because the ordinance does not specify it.

Q The ordinance does not specify it?

A That's correct.

Q Who would have to take the responsibility of seeking a rezoning of the areas which are in the lighter green?

A The person proposing to use the property for other than residential purposes.

Q Now, could you tell the Court what the situation is with regard to street lighting in the area that is green at the bottom?

A To the best of my knowledge, the city's subdivision requirements require street lighting on all public streets. [61] I have not independently investigated whether the street lights in that area are up and working.

Q In connection with the area that's marked in a dark green here, are there any public streets that run through there?

A Yes.

Q At the present time?

A That's correct.

Q And you have no idea whether there's any lighting there?

A That's correct.

Q The area that you designated up here, you say is part of the Pacific Car Foundry location?

A Yes.

Q When did you first discover that that was available for adult use?

A It was after the preparation of my affidavit.

Q And how did you discover that?

A I simply misread one of my earlier working maps.

Q Did you do an eyeball inspection of that area, sir?

A Yes, I have.

Q And what is that location presently used for?

A It's a part of the truck testing facility that's a part of the PACCAR facility.

Q It is currently used as a truck testing facility?

A Yes, it is.

Q At the present time?

A Yes.

[62] Q All right. Now, what about the area that's marked down here off of—

A I believe that's Hardy and Southwest 7th.

Q Yes. In the corner there. Have you done an eyeball inspection of that piece, sir?

A As Mr. Johnson testified earlier, there's a Shakey's Pizza Parlor and a Burger King Restaurant.

Q Is there any other property available in that area that you know of?

A No. Only the parcels that those are currently on.

Q And they're brand new, are they not? Aren't they brand new within the past four or five years?

A Yes.

Q So that the area over here that—it looks like a river channel is flowing through that. What does that mean, sir?

A That's an abandoned channel. The channel is no longer in that location.

Q It's not part of the flood plain?

A No.

Q And that's on Thomas Avenue?

A That's correct.

Q Did you do an eyeball inspection of that area?

A Yes, I have.

Q Is that part of the industrial park?

[63] A There is an industrial building on the property.

Q Is there a plan that's been filed to designate that as an industrial park?

A It already is.

Q It is an industrial park. Light manufacturing, sir?

A I believe it's a warehouse.

Q Have you noticed whether there are any street lights in that particular area?

A No, I have not reviewed that.

Q Now, down here at the bottom there are a series of comments about, "It's a Burlington Northern Industrial Park" that encompasses most of the green area here, is that correct?

A A substantial portion of it, yes.

Q Do you have any idea what limitations the Burlington Northern places on prospective tenants in this location?

MR. WARREN: I'm going to object to the line of questioning, Your Honor. We're well outside the scope of the direct. He's going parcel by parcel, apparently.

THE COURT: Well, I'd allow him to re-open, anyway, and call him. Did he list this gentleman as a witness?

MR. WARREN: Mr. Clemens, no.

THE COURT: I'll have to cut you [64] off then. Sustained.

MR. SMITH: This is in response to the examination where they put the areas up. We have had a series of changes in the location which then we're confronted with another change, as I said in part, which is here, new evidence which is introduced. It relates to orange areas which we can now do platting. So this is all part of the—

THE COURT: I would let you inquire on cross with respect to his knowledge of the current uses of property where the maps they've now prepared are different and show different parcels than have been shown on the earlier maps. I'd allow you to cross-examine on those.

Q (By Mr. Smith)—Now, sir, this is again the Exhibit No. 8 and the area you've marked in green is the

area that you feel from your examination under the original ordinance an adult theater use could be located, is that correct?

A That is correct.

Q Now, is there any different areas on the exhibit that you've now brought in here, which is designated as A-1, and the overlays, any different uses that are currently being put to the land in this area for the green than was used in the area designated again on this map?

[65] A I'm afraid your question got lost.

Q Okay. I'll withdraw it.

If someone would come into your office as of the first of January of 1982 and inquire concerning the areas available in which to put an adult motion picture theater, which areas could he have found by inspection of the zoning ordinance were available, if you know?

A By inspection of the zoning ordinance?

Q Correct.

A The two classifications of the ordinance which you would look to would be the business district to determine whether a theater is allowed, secondly, the section on adult entertainment land uses, which speaks to adult theaters.

Q And the only area that one on June 1, 1982, could have determined was available is the area now marked in green on Exhibit 8, is that correct?

A On that date, yes.

Q On that date.

MR. SMITH: Thank you. No further questions.

MR. WARREN: Just one or two questions.

[66] REDIRECT EXAMINATION

BY MR. WARREN:

Q Mr. Clemens, with respect to the first map, and that was the exhibit from the temporary restraining order hearing, how long did you have to prepare that map?

A A matter of hours.

THE COURT: Which exhibit are we talking about, 8?

MR. WARREN: I don't know the designation, but it was the exhibit from the temporary restraining order hearing.

THE COURT: Oh, yes. All right.

Q (By Mr. Warren) And, Mr. Clemens, you subsequently obviously found an error on that first map. Can you tell me the source of the error?

A Yes. The source of the error is that the concluding section of the adult entertainment land use district states that where a portion of a piece of property is within the prescribed distances, the entire parcel is eliminated. As a result the number of parcels were eliminated because of that section.

Q Now, with respect to the light green parcels on Exhibit 1-A with the white dashed line around it, which you explained G-1 zone and as a holding zone, do you know the comprehensive plan designation for those parcels?

[67] A Yes. They are industrial park, with the exception of the city's parcel which is currently a green belt—wet land area.

Q Mr. Clemens, outside of environmental reasons that might be put forward for the larger of those parcels, do you know of any reason why that property could not be rezoned—

MR. SMITH: Objection, Your Honor. Counsel has argued he's not a lawyer, he's not qualified.

THE COURT: Well, he's a planning and zoning expert, isn't he?

MR. SMITH: Your Honor, I'm just saying that the objection they made to the questions I asked him calling for expertise he didn't have.

THE COURT: I'll overrule the objection.

THE WITNESS: Subject to environmental considerations, I believe that the property could be zoned industrial park as shown in the comprehensive plan.

MR. WARREN: No further questions.

RECROSS-EXAMINATION

BY MR. SMITH:

Q Environmental considerations means what, sir?

[68] A Would include both the natural and human environments.

Q And human environment would include parking and traffic patterns, would it not?

A Yes.

Q Is there any way that someone would know in advance what the rules and regulations were that were going to be applied in terms of the natural environment?

A Yes. Both the State and National Environmental Policy Acts spell out the provisions quite clearly.

Q And what about with regard to the parking aspect and the traffic pattern? Would someone know in advance how you all were going to apply those environmental concerns?

A Yes. The city has a parking-loading ordinance which prescribes certain amounts of parking, number of driveways, and those kinds of things.

Q Is the Renton and Roxy Theaters in violation of that policy?

A No, sir.

Q Pardon?

A No, sir.

Q They are not?

A No, sir.

Q When did you learn that you had left out a piece on one of the exhibits where the Pacific Car Foundry was located?

MR. WARREN: Objection. Asked and [69] answered.

THE COURT: Well, maybe it has been. I'll let him answer it.

A It was after the preparation of the affidavit.

Q (By Mr. Smith) Which was some time in May? May 26, 1982. Does that sound correct?

A If that's the date on it. I don't have it before me.

Q Did you or, if you know, the attorney for the city tell counsel for the plaintiffs about that omission on your part prior to coming to court today?

A I'm not even sure that I brought it up with counsel because I realized that the parcel was already developed.

Q You had lots of time—when you say, "The parcel was already developed," what does that mean?

A There's an existing use on the property.

Q Which means it can't really be used, practically speaking, for an adult theater, is that correct?

A Correct.

Q Now, you had plenty of time to assert that the error was made and to advise counsel for the city, did you not, sir?

A Yes.

Q You didn't. You just chose not to let them know, is that correct?

A Yes.

[70] Q All right. Now, how long after you did the initial exhibit, we're talking about the map you testified in connection with the hearing on the temporary restraining order, how long after you did that map was it before you learned that you had made a significant error?

MR. WARREN: Object to the characterization.

THE COURT: Overruled.

A It was after the hearing.

Q (By Mr. Smith) The same day?

A No. It would have been within a period of—could have been several weeks after the hearing.

Q And did you then call that to the attention of your attorneys?

A Yes, we did.

Q And did you call that to the attention of the Court to tell them that you had made an error in your testimony?

A No, sir. I made the information available to counsel.

Q And you did not yourself communicate it to counsel for the plaintiff?

A No, sir.

Q Do you know whether or not your counsel communicated it to counsel for the plaintiff or to the Court?

A I have no independent knowledge of that.

Q Did you write a letter to them telling your counsel that [71] you had discovered this significant error?

A No, sir.

Q Did you discover the error prior to your deposition taken in early March?

A Yes.

Q And this map that you prepared is the one that you did not—you refused to give counsel at the time of your deposition, isn't that true?

A That's correct.

MR. SMITH: Thank you. No further questions.

MR. WARREN: I have no further questions, Your Honor.

THE COURT: You may step down, Mr. Clemens.

* * * *

EXHIBIT 3

4-711: B-1 BUSINESS DISTRICT:

A. In the B-1 Business District, no building, structure or premises shall be used or hereafter erected or structurally altered unless otherwise provided for in this Chapter, except for one or more of the following or similar uses:

(1) Any use permitted in Residence District R-2, Residence District R-3 and Apartment Houses and Multiple Dwellings District R-4 (but excluding any residential family dwelling uses specified in Residence District R-1) but any such use herein permitted in a R-2, R-3 and R-4 District shall be subject to all limitations and restrictions, including height and setback requirements as are applicable in the R-4 District.

(2) Banks.

(3) Barber shops, beauty parlors, personal service shops.

(4) Furniture stores, drug stores.

(5) Laundries, clothiers, cleaning and pressing establishments.

(6) Locksmiths, shoe and other repair shops.
(Ord. 2023, 4-15-63)

(7) Lumber yards and fuel yards, allowed by special permit following approval by the Hearing Examiner after public hearing thereon and acceptance of the design and an examination of the location with a finding that such proposed use is in compliance with all provisions, regulations and standards and will not be unduly detrimental to adjacent surrounding properties and enjoyment thereof; provided that when unhoused they shall be

surrounded by an eight foot (8') solid wall or sight-obscuring fence herein known as a structure, and the yard regulations of this district shall be observed and, provided further that

- A,7) no such lumber yard or fuel yards shall be maintained closer than one hundred feet (100') to the side lines of residential districts. (Ord. 3101, 1-17-77, eff. 1-1-77)

(8) Police and fire stations.

(9) Parking lots.

(10) Printing establishments.

(11) Public garages, repair shops and battery service stations and tire repair shops.

(12) Restaurants, cafeterias and caterers.

(13) Retail trade shops, arts and crafts shops or stores or combinations thereof.

(14) Sales room or store rooms for motor vehicles and other articles of merchandise.

(15) Service stations.

(16) Stores, shops, retail and wholesale markets, of all types or any combination thereof.

- A) 17. Studios, offices, business or professional.

18. Telephone exchanges, telegraph offices and employment agencies.

19. Undertaking establishments. (Ord. 2023, 4-15-63)

20. as amended: Mobile home parks as provided in the Mobile Home Park Ordinance, known as Chapter 20, Title IV, may be allowed by special permit if approved by the Hearing Examiner after public hearing thereon, the acceptance of the design, and

an examination of the location with a finding by the Hearing Examiner that such proposed use will not be unduly detrimental to adjacent and surrounding properties and the enjoyment thereof. (Ord. 3101, 1-17-77, eff. 1-1-77)

21. Self service storage facilities contained entirely within one building may be allowed by special permit, upon recommendation by the Hearing Examiner and approval by the City Council, after public hearing thereon and acceptance of the design and approval of the site plan, including but not limited to the landscaping and screening from adjacent properties, with a finding that such proposed use is in compliance with all provisions, regulations and standards and is compatible with the uses in the general area, and will not be unduly detrimental to adjacent surrounding properties and the enjoyment thereof. (Ord. 3333, 7-9-19)

- B. Signs are permitted only as specifically provided in the "Renton Sign Code" also known as Chapter 19 of Title IV (Building Regulations) of Ordinance No. 1628. (Ord. 2023, 4-15-63)

- C. Height Limit: Whenever any B-1 District is contiguous to any single family residence or suburban residence district, the buildings in such B-1 District shall be limited to the height of thirty five feet (35'), plus additional twenty five feet (25') by special permit after public hearing and examination of the location, upon due proof to the satisfaction of the City Hearing Examiner that such additional height will not be unduly detrimental to the adjacent and surrounding property. No building shall exceed a height of ninety five feet (95'). (Ord. 2023, 4-15-63; amd. Ord. 3101, 1-17-77, eff. 1-1-77)

- D. Front Yard and Side Yards: No yards are required except for lots whose side line is adjacent to a resi-

dential district where said yard regulations shall then be the same as in the residential district; front yard shall conform to adjacent residences, side yard to be not less than five feet (5'), side yards on adjacent streets to conform to front yards of residences to the rear but to be not less than ten feet (10') and rear yard shall not be less than ten feet (10').

* * * *

- (F) Conditional Use Permits. Upon proper application, the Hearing Examiner may grant conditional permits for such uses as require them under this Title.

1. Purpose of a Conditional Use Permit: The purpose of a conditional use permit shall be to assure, by means of imposing special conditions and requirements on development, that the compatibility of uses, a purpose of this Title, shall be maintained, considering other existing and potential uses within the general area of the proposed use. The Examiner may deny any application if the characteristics of the intended use would create an incompatible or hazardous condition. Except as provided in Section 4-722(F) (3) (m), the Hearing Examiner shall not use a conditional use permit to reduce the zoning requirements of the zone in which the use is to locate. Such reduction of requirements shall be accomplished only through the medium of a variance. The Examiner shall have the right to limit the term and duration of any such conditional use permit and may impose such conditions as are reasonably necessary and required. The conditions imposed shall be those which will reasonably assure that nuisance or hazard to life or property will not develop.

2. Additional Uses Permitted: The Examiner may, after a public hearing, permit the following

uses in districts from which they are prohibited by this Chapter where such uses are deemed essential or desirable to the public convenience or welfare and are in harmony with the various elements or objectives of the comprehensive plan:

(a) Cemetery, columbarium, crematory or mausoleum

(b) Development of natural resources (excluding the drilling for or producing of oil, gas or other hydrocarbon substances) together with the necessary buildings, apparatus, or appurtenances incident thereto.

(c) Educational institution, public or private

(d) Government offices and facilities (Federal, State and local)

F,2) (e) Hospital, sanitarium or similar uses

(f) Public or nonprofit library or museum

(g) Nursery or greenhouse

(h) Park, playground, or recreational or community center

(i) Philanthropic institution

(j) Private club, fraternal or nonprofit organization

(k) Public utility use or structure

(l) Radio or television transmitter

(m) Permit a less restricted use in a more restricted district as follows, provided such use, due to its limited nature, modern devices, or building design will be no less objectionable than the uses permitted in such district:

(1) Any B-District use in the P-1 District

(2) Any L-1 District use in the B-1 District

(3) Any H-1 District use in the L-1 District

3. Considerations, Finding and Determination: In reviewing conditional use permit applications, the Hearing Examiner shall be empowered to approve, conditionally approve or disapprove said conditional use permit applications based on normal planning considerations, including but not limited to the following factors:

- (a) Suitability of site;
- (b) Conformance of the comprehensive plan;
- (c) Harmony with the various elements or objectives of the comprehensive plan;
- (d) The most appropriate use of the land through the City;
- (e) Stabilization and conservation of the value of property;
- F,3) (f) Traffic flow;
- (g) Circulation;
- (h) Safety for vehicular and pedestrian traffic;
- (i) Imposition of noises, odors and health and safety hazards upon nearby residential area;
- (j) Provision of adequate light, air and reasonable access;
- (k) Securing safety from fire and other dangers;
- (l) Prevent overcrowding of land;
- (m) Facilitating adequate provision for transportation and in general, to promote the public health, safety, and welfare;

(n) Prevention of neighborhood deterioration and blight;

(o) The objectives of zoning and planning in the community;

(p) The effect upon the City's general welfare of this proposed use in relation to surrounding uses and the community.

* * * *

4—725: AMENDMENTS:

- (A) The Council may upon proper petition or upon its own motion, after a public hearing thereon and referral to and report from the City Hearing Examiner, change by ordinance the zoning classifications as shown on the district maps.
- (B) The Council may upon its own motion after public hearing and referral to and report from the City Planning Commission, amend, supplement or change by ordinance the regulations herein established.
- (C) An application for a rezone of property may be made by the property owner, or somebody authorized on his behalf on forms provided by and filed with the Planning Department. Such application shall be referred to the Hearing Examiner for hearing as required by Chapter 30, Title IV. All petitions for a rezone shall be accompanied by a plat in duplicate, drawn to scale, showing the actual dimensions of the tract to be changed, the size, the use and location of existing buildings and buildings to be erected and such other pertinent information as may be required by the Planning Department.
- (D) A petition for a change of zoning classification, seeking the same or substantially same relief as a prior petition, cannot be re-filed or re-submitted

with the Hearing Examiner or the City Council, for a period of twelve (12) months from the date of final disapproval or rejection of such prior petition. (Ord. 3463, 8-11-80)

* * * *

EXHIBIT 4

PLANNING AND DEVELOPMENT COMMITTEE COMMITTEE REPORT SEPTEMBER 8, 1980

REGULATION OF ADULT ENTERTAINMENT LAND USES (referred 6/23/80)

The Planning and Development Committee has considered the question of regulation of adult entertainment land uses and recommends that the City Council refer the matter to the Planning Commission for consideration at the earliest possible date. The Committee recommends that the Planning Commission be directed to hold public hearings at the earliest possible date on the subject of possible amendments to the Comprehensive Plan and amendments to the Zoning Code as may be desirable to regulate adult entertainment land uses within the City of Renton.

/s/ Randy Rockhill
RANDY ROCKHILL
Chairman

EARL CLYMER

JOHN REED

[EXHIBIT 5]

PLANNING COMMISSION
RENTON, WASHINGTON
[Address Illegible]

November 24, 1980

Renton City Council
Municipal Building
Renton, Washington 98055

RE: *ADULT ENTERTAINMENT LAND USES*

Dear Council Members:

The Planning Commission received and first considered your referral on adult entertainment "land uses" at its regular meeting on September 10. At that meeting, the Commission referred the matter to its Special Studies Committee for investigation and report back.

The Special Studies Committee initially met with Dan Kellogg, Assistant City Attorney, who explained the Council's referred item. The Committee members considered various options open to the committee and to the Commission. After looking at said options, it was unanimously decided by the Committee to refer the matter back to the full Commission with the recommendation that the Commission, in turn send the question of adult entertainment back to the Council for further action as it deems necessary. The Commission met at its regular meeting of November 12, and concurred in the Committee's recommendation.

The Commission, at this time, has before it many matters which it feels are of great importance and urgency. The Commission, therefore, respectfully suggests that the referred subject matter could best be handled by a Council

committee and a citizen's committee appointed by the Council and reporting directly to the Council for the specific purpose at hand.

The Commission also feels that most of the facets involving adult entertainment are not within the purview of the Commission, except perhaps in some later review of the zoning ordinance. The overriding consensus is that the Commission is overburdened with priorities which the Commission feels are in need of immediate action.

The Commission notes that the following pressing physical land use issues must be studied with the most expeditious speed possible (some of which obviously require lengthy time and study):

1. The Northeast Quadrant review of the comprehensive plan now under way and which will continue for eight or more months.
2. The Central Area study encompassing the downtown business district, South Renton, North Renton, Earlington, West Hill and Skyway, which likewise is under way and will continue for eight to ten months.
3. The Shoreline Master Plan which, by law, requires periodic review and update.
4. Review of the Green River Valley comprehensive plan.
5. Review of the comprehensive plan relating to mobile home parks.
6. Review of the parking and loading ordinance.
7. Review of the PUD ordinance.

As you can see, the Planning Commission schedule is very full. The Commission regrets its inability to handle the

Council referral at this time based on the above urgent priorities.

Respectfully,

/s/ Michael G. Porter
MICHAEL G. PORTER
Chairman,
Renton Planning Commission

MGP:ms

cc: Mayor Shinpoch
City Attorney

[Exhibit 6 to this hearing was inadvertently omitted from the initial printing of the Joint Appendix. It appears at JA 411.]

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[EXHIBIT 7]

PLANNING AND DEVELOPMENT COMMITTEE
COMMITTEE REPORT
APRIL 6, 1981

ADULT ENTERTAINMENT LAND USE—(Referred 12/1/80)

The Planning and Development Committee, after considerable review of this subject, including two meetings where public input was received, feel that it is in the best interest of the City of Renton and the desire of its citizens to provide regulation for the so-called adult motion picture theater location.

Therefore the Committee recommends:

1. That the Council concur and refer the subject to the Ways and Means Committee for the appropriate ordinance.
2. That the ordinance be written to reflect the following desired conditions:
 - a. No adult motion picture theater will be allowed in any area used or zoned residential or in any P-1 public use area.
 - b. A suitable buffer strip of 1000 feet from any residential or P-1 area also be a banned area.
 - c. The area enclosed in a one mile radius of any school (this is the minimum student walking distance) would also be a banned area.

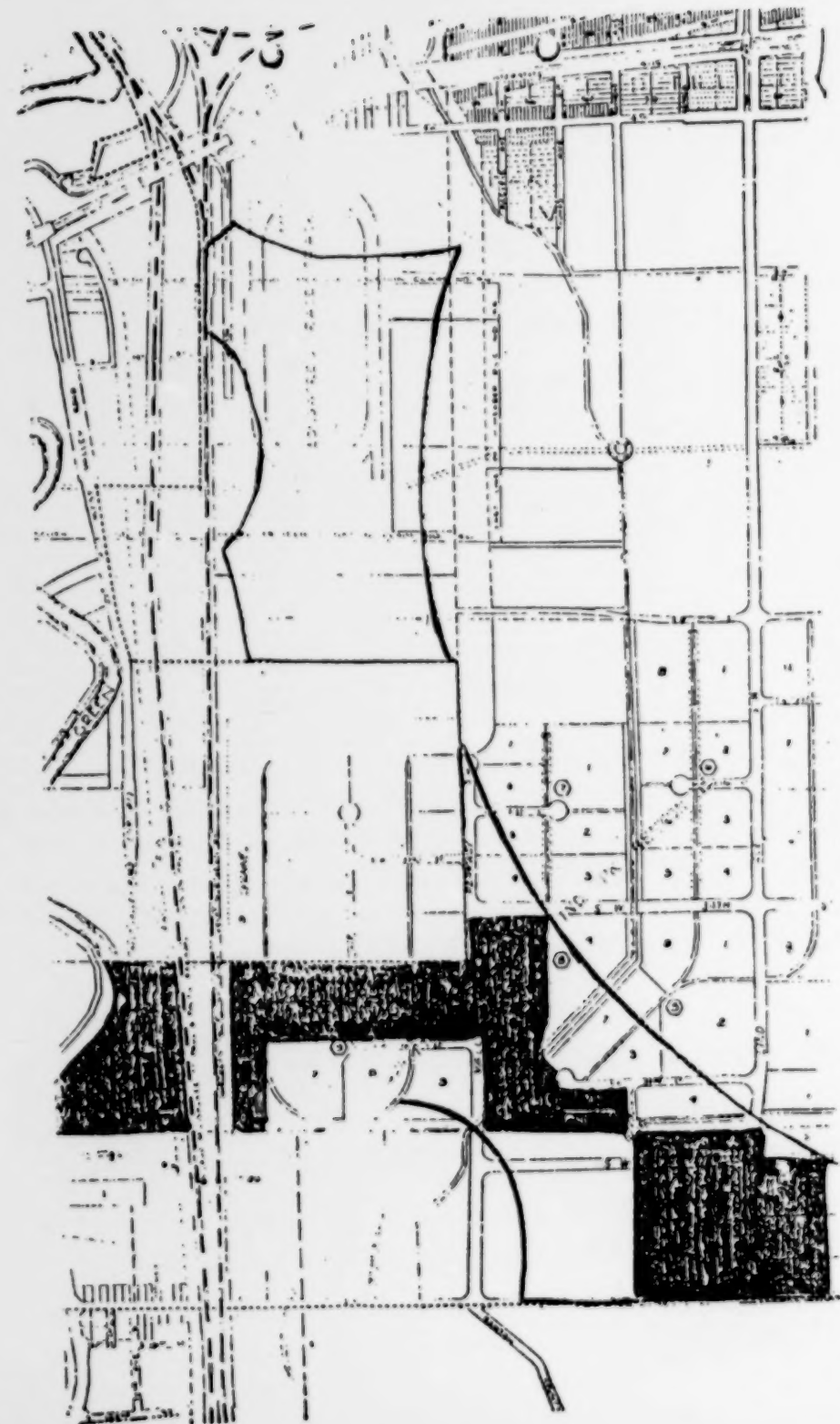
/s/ Randy Rockhill
RANDY ROCKHILL
Chairman

/s/ Earl Clymer
EARL CLYMER

/s/ John W. Reed
JOHN REED

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[EXHIBIT 8]



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C82-59M

PLAYTIME THEATERS, INC.,
a Washington corporation, *et al.*,
Plaintiffs.

vs.

CITY OF RENTON, *et al.*,
Defendants.

DEPOSITION UPON ORAL EXAMINATION
OF ROGER H. FORBES

BE IT REMEMBERED that the Deposition Upon Oral Examination of ROGER H. FORBES, appearing as a witness at the instance of the defendants, was taken at 100 South Second Street, Renton, Washington, beginning at the hour of 1:30 o'clock p.m., on April 9, 1982, before Robert C. Webber, Notary Public in and for the State of Washington;

APPEARANCES:

ROBERT E. SMITH and JACK R. BURNS, Attorneys at Law, appearing for and on behalf of the plaintiffs;

JAMES CLANCY and MARK BARBER, Attorneys at Law, appearing for and on behalf of the defendants;

WHEREUPON, the following proceedings were had and [2] testimony taken, to wit?

EXAMINATION INDEX

| Counsel | Page |
|------------|------|
| Mr. Clancy | 2-92 |

MR. CLANCY: This is the deposition of Roger H. Forbes as an individual person and as President of Playtime Theaters, Inc., and Kukio Bay Properties, Inc., in a Federal action known as Playtime Theaters, Inc., a Washington corporation, and Kukio Bay Properties, Inc., versus City of Renton and a number of other defendants. The deposition is on notice and there is a Subpoena Duces Tecum to produce a number of items at the deposition. The original service was on March 12th. The deposition was set for March the 19th and then pursuant to stipulation of counsel and convenience of counsel, it was continued to the present date which is April the 9th.

ROGER H. FORBES,

who having been first duly sworn by the Notary, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLANCY:

Q Mr. Forbes, are you the Roger H. Forbes who is President of Playtime Theaters, Inc., and Kukio Bay Properties?

A I am.

Q Are you the person who verified the original Complaint which was filed in this action on January 20, 1982?

A Yes, sir.

[3] Q In that Complaint, you did verify the facts appearing therein as the President of both corporation, did you not?

A Yes.

Q With respect to the original Complaint, you stated that one of the parties is Playtime Theaters, Inc., a Washington corporation. Is Playtime Theaters, Inc., a corporation which was incorporated in the State of Washington?

A Yes.

Q When was it incorporated?

A I think 1976.

Q Do you remember what date?

A Probably around the end of February of that year.

Q What is the business of that corporation?

A The exhibition of motion pictures.

Q Is that the only business that it is authorized to do?

MR. SMITH: Objection; that's a legal question. What it is authorized to do and what it does are two different things. I will instruct him not to answer.

Q Do you have the Articles of Incorporation for Playtime Theaters, Inc.?

A Not in my possession.

Q Who are the officers of Playtime Theaters, Inc.?

A I am.

Q What office do you hold?

[4] A President.

Q Are there any other officers?

A No.

Q Who owns the stock in Playtime Theaters, Inc.?

A I do.

Q Are you the only stockholder in that company?

A Yes.

Q Where is the principal place of business for Playtime Theaters, Inc.?

A The main offices are located at 512 Second Avenue, Seattle, Washington.

Q Is that on any floor of that building?

A Second floor.

Q Any particular room?

A No, the entire second floor.

Q How many persons are employed in that office?

A Five or six.

Q Are they regular employees of Playtime Theaters, Inc.?

A Right.

Q What are the names of the employees?

A Mark Lowrie, Juanita Hamlin, Patty Jones, Lisa Puddy. I think that's about it.

Q You have given me four people.

A There are a couple of more, but I don't remember their names right offhand.

[5] Q What does Art Lowrie do?

A He's the Operations Supervisor.

Q Is that his official title?

A Yes.

Q What does Juanita do?

A She would be my Administrative Assistant.

Q What's her last name?

A Hamlin.

Q Is it Mr. Jones?

A No, Ms.

Q What does she do?

A Bookkeeper.

Q And Lisa?

A Advertising.

Q Did you say those individuals that you have just named, are department heads?

A Yes.

Q Does Lisa control the advertising that's done by Playtime Theaters?

A She makes up the advertising and places it.

Q Who is she responsible to?

A Me.

Q Is she authorized to do any advertising without your approval?

A She places the ads for the theaters on numerous occasions [6] without my approval and I don't see everything that's done.

Q Does she make up the ads without your approval?

A Sure.

Q What type of advertising does Playtime Theaters do?

A Advertises in the newspapers for the theaters that are operated by it.

Q How many theaters are there and how many places?

A Well, there is about a dozen theaters. There is advertising placed in the Vancouver newspaper, Vancouver,

British Columbia; Spokane, Tacoma, Bremerton, Seattle. I think that's about it.

Q How many cities is that a total of?

A Where the theaters are located?

Q Yes.

A Well, I would have to stop and figure it out. Seven, I think.

Q Have you named all of the cities?

A No. There are some cities that we don't advertise at all.

Q What would those cities be?

A Pasco.

Q Any others?

A Not that I can think of.

Q Is the same advertising done in each city or is there separate advertising done?

A A separate campaign is done for each city.

[7] Q Are they related in any way so that the ads for one city are run in a different city?

MR. SMITH: Object to the form of the question. If he shows one movie in Downtown Seattle, they obviously are not going to put the same ad for the same movie in Seattle that appears in Spokane. I think the form of your question is incorrect and I'll instruct him not to answer.

MR. CLANCY: Why is it so obvious that they are not going to use the same ad?

MR. SMITH: Why don't you ask if it is the same picture playing in every theater in the state at the same time? Obviously if they are, that's one thing. Your question doesn't frame that issue.

Q The ads that you place in one city for a given film, is that same ad used in other cities?

A Normally.

Q Does Lisa have the authority to make up the original ad which is run on a given film?

A Sure.

Q Does she submit it to you for your approval?

A Sometimes.

Q Let me ask you a general question then. Are the same films run in each of the twelve cities, in each of the twelve theaters that you have?

MR. SMITH: Object to the form of the question.
[8] You mean at the same time or at different times or over a period of one year? That's too broad. I instruct him not to answer.

Q To be specific, what is the name of the theater in Seattle?

A There are two theaters in Seattle.

Q What are those?

A The Palace and the Embassy.

Q What's the name of the theater in Pasco?

A The Liberty.

Q What is the name of the theater in Spokane?

A The Dishman.

Q Bremerton?

A The Grand.

Q Tacoma?

A There are two theaters there, one is the Rex and the other is the Community.

Q What are the two cities that I haven't named as yet?

A Well, there is one in Portland called the Walnut Park and there is one in Point Roberts called Point Roberts, and there are two theaters in Renton that I probably forgot about, the Renton Theater and the Roxy. There is one in Redmond which is named the Cinemond.

Q Then as to Seattle, the Palace and the Embassy, does the Palace show the same film that the Embassy shows?

A No.

[9] Q In a given week, are the films that are shown at the Palace different than the films that are shown at the Embassy?

A Yes.

Q In a given week, do you ever show the same film at both theaters?

A No.

Q With respect to Tacoma, the Rex and the Community Theater, in a given week, is a given film shown at both theaters at the same time?

A No.

Q Do I understand you to say that the Rex and the Community Theaters always show a different film?

A Yes.

Q With reference to the ten theaters that you have named, excluding the two in Renton, in a given week, do any of those ten theaters show the same film?

A Possibly.

Q With respect to the ten theaters, are the films shown at random in each theater or is there a specific procedure that you use as to each film?

MR. SMITH: Do you understand the question?

THE WITNESS: I know what he's trying to say. There is not—if you are looking for a particular formula as to the way they play together or not play together, [10] there is not a set formula that is not in a state of change.

Q Let's go to specifics. Do you know what is now showing at the Palace in Seattle?

A No, I don't.

Q Do you know what is now showing at any of those ten theaters that you have just named?

A I really don't.

Q With respect to your administrative assistant, Mrs. Hamlin, what is the authority of Mrs. Hamlin as your administrative assistant?

A To supervise the operation of the business when I'm not in town.

Q When you are not in town, what does she do?

A Well, we are normally in communication by telephone, and she would alert me to whatever is transpiring in the day-to-day operation of the business, and I would instruct her how to handle the situations that arise.

Q What would be her duties in a given day when you were not in town?

A Well, I don't know exactly how to answer that because unfortunately the people that work for me don't have a specific job outline to work by so they do whatever becomes necessary at that time.

Q What are some of the things she would do normally?
[11] Well, if you could ask me whether she does or she doesn't do something in a certain area, I can tell you yes or no, but I can't really give you an outline of what she does.

Q Are there certain things that you expect her to do?

A Nothing more than to make sure that things run along properly.

Q Does she make up payroll?

A No.

Q Does she select what movies are to be played at the separate theaters?

A No.

Q Does she purchase equipment for the corporation?

A If you are talking about adding machine tape, yes. If you are talking about projection equipment, no.

Q Does she enter into negotiations for the leasing of films?

A No.

Q Does she make any decision on what films would be shown by the ten theaters?

A No.

Q Does she examine the films which are to be shown at the theaters?

A No.

Q Which of the four individuals that you have named would be the person who would examine any of the films that you show before they are shown?

[12] S None.

Q Who's the person who has the authority to examine the films before they are shown?

A Dick Witte.

MR. SMITH: As in Pussycat Theater Chain in Los Angeles.

Q Where is Mr. Witte?

A He's located in Los Angeles.

Q Where is he located in Los Angeles?

MR. SMITH: I told you, the Pussycat Theater, the main office in Santa Monica.

Q What is the relationship between the Pussycat Theater and Playtime Theaters, Inc.?

A They are retained as the film-buying service for Playtime Theaters, Inc.

Q Is that by written contract?

A Verbal.

Q Has it ever been in writing?

A No.

Q Inviting your attention to the year 1972 when Playtime Theaters, Inc., was incorporated, was that incorporated by you? I believe you said it was in February?

A Yes, it was incorporated by me.

MR. BURNS: The year wasn't correct.

Q What was the year?

[13] A '76.

Q At the time of the incorporation, what were the officers of the corporation?

MR. SMITH: Objection as to relevancy unless you can verbalize and demonstrate the relevancy to the lawsuit and reasonably leading and calculated to discovery evidence material to your counter-attack, then we will instruct our client not to answer.

Q You are now the President?

A Yes.

Q How long have you been President?

A Since the inception.

Q That was February, 1976?

A I think so.

Q How long have you been the sole stockholder in the corporation?

A Since its inception.

Q You say Mr. Witte has been retained as the film-buying service. How long has Mr. Witte been under contract to Playtime?

A Since January 1st of 1982.

Q Prior to January 1st of 1982, who was authorized to examine the films that are shown at Playtime Theaters?

A I was.

Q Were you the only person who was authorized?

[14] A Well, we had a number of people view the films, if that's what you are talking about.

Q Who else then was authorized to review the films besides you?

A Well, the individual theater managers and we have Art Lowrie.

Q Is Mr. Art Lowrie the Operating Supervisor?

A Yes.

Q How long has Mr. Lowrie been the Operations Supervisor.

A Four years maybe.

Q What are his duties as Operations Supervisor?

A What the title says, supervises the operation of the theaters, the hiring and firing of the managers, the way the theater is kept, the way they are equipped.

Q Does he select the films for those theaters?

A No.

Q Did he have any authority for selecting the films?

A At that time?

Q Yes.

A On occasion, yes.

Q On what occasions would he be given the authority to select the films?

A If I hadn't got around to booking them.

Q Were any other individuals authorized to select the films for the theaters?

[15] A Not to my knowledge.

Q Then my understanding of your testimony is that on January 1st of this year, you changed your procedure so that Dick Witte is the one who selects the films?

A That's true.

Q Prior to that time, you selected the films?

A Yes.

Q Except on occasion and then Art Lowrie did perform that function when you were not available?

A That's true.

Q When was the contract with Mr. Witte negotiated?

A In November of 1981.

Q Any particular reason why you changed your operating procedures?

A Yes.

Q What was the reason?

A Because I didn't look at all the films and seeing that they are the dominant theater circuit in California, that they look at all the films and would have a better feel for what is going on and could select better films for me to exhibit.

Q Are the films that you show, the same films that are shown at the Pussycat Theaters?

A Yes.

Q Do you show any additional films that they do not show?

[16] A Not to my knowledge.

Q Does he look at the print that is to be shown at your particular theater?

A I presume that all the prints are the same. He looks at one of them.

Q Are the prints that you receive at your theaters sent to you by Mr. Witte?

A No, they are shipped to us from the distributor.

Q Who is the distributor?

A There are numbers of different distributors.

Q What are the names of some of those?

MR. SMITH: Objection. There is no relevancy, we think, to the zoning ordinance challenge as being unconstitutional with regard to who the distributors of films are. I instruct him not to answer.

MR. CLANCY: Well, the basis for my inquiry is that would be in the defenses that the City intends to assert in the answer, one of which subject matter would be obscene and in violation; two, that the films are received from an agency which is not in the normal distribution of

traditional films; three, that the films which are shown by the distributor, handled by the distributors are that type of film which is of pandering type of film, and it would be a circumstance of the production, distribution and exhibition of such films which would be relevant, which [17] would be probative on showing the nature of the operations of the corporation, that is, the films which are shown are films which are pandered.

MR. SMITH: We would object and would continue our objection to Mr. Forbes being asked those questions. I don't think they are relevant. Number one, the Magistrate has already advised the parties that your pandering concept doesn't hold much water as far as he's concerned. I don't see where it's relevant to any possible defense. We have admitted that these are adult films which are going to be shown at the theater. You talk about other than the ordinary course of distribution for normal films, they are subjective terms which you are using by your standards, and I don't think that you have established any standard of what is normal and what is not normal distribution. If you ask Mr. Forbes what kind of films he shows at his theaters and has shown at his theaters in the past years, he will be happy to answer you, and in that way you will have what you need to know, in our opinion. Otherwise, I would instruct him not to answer.

Q Mr. Forbes, how long have you been a motion picture theater operator?

A Well, I have been in the exhibition of motion pictures since I was sixteen years of age.

[18] Q Going back to sixteen then, what were you doing at sixteen?

MR. SMITH: Objection. The time period is far beyond the scope of anything we have here. We presume that Mr. Forbes is thirty-nine years old. That's an awfully long time ago. If you want to go back the last five years, fine.

MR. CLANCY: He went back to sixteen.

MR. SMITH: You asked him when he was in the theatrical exhibition business. He might have done it in

a Boy Scout Troop when he was sixteen. What's the relevancy to this particular inquiry?

Q How long have you been the owner-operator of a motion picture theater?

A With this corporation, since 1976.

Q Then prior to 1976, were you a motion picture theater operator-owner?

A No.

Q When did you first become the owner-operator of an adult motion picture theater?

MR. SMITH: Objection, asked and answered. He told you 1976.

MR. CLANCY: Repeat the question, please.

(Last question read back.)

MR. SMITH: You can answer for the year.

[19] THE WITNESS: I don't remember exactly.

Q Was it prior to 1976?

MR. SMITH: Did the question say owner-operator?

MR. CLANCY: Yes.

A I would have to stay with 1976 really. I can't sort the rest of it out.

Q Then the answer is that you first became an owner-operator of an adult motion picture theater in 1976?

MR. SMITH: Objection. His answer is to the best of his recollection, he became an owner-operator in 1976. You have made a modification and drawn an improper conclusion from what he said. He said he couldn't sort it all out.

Q In the period between 1976 and 1982, has the Playtime Theaters, Inc., always been an operator of adult motion picture theaters?

A They have operated motion picture theaters.

Q Do the ten theaters that you have named show regular film fare other than adult motion pictures?

A They show motion pictures. Motion pictures are motion pictures to me.

Q Do you understand an adult motion picture to have any particular meaning?

A A motion picture made for adults.

Q Does Playtime Theaters show motion pictures that are meant [20] to be shown to adults?

A Yes.

Q Do they show other motion pictures that are to be shown to persons that are not adults?

A It has.

Q On how many occasions?

A Well, I can think of at least two theaters that we had that showed other than adult motion pictures.

Q What theaters are those?

A Well, both of which we no longer have. One is the North End Cinema, which is called the Greenwood Theater today. The other one was called the Rainier Cinema.

Q Is that in Rainier, Washington?

A No. It's in Rainier Valley in Seattle.

Q Do you own that now?

A No.

Q Did you at one time own it?

A I had a lease on the property.

Q How long was it operated by you?

A A year.

Q In the period of that year, did it show adult motion pictures?

A It did in the beginning.

Q For how long in the beginning?

A Two or three months.

[21] Q Did it cease showing adult motion pictures at that time?

A Yes.

Q It then went over to the showing of regular motion picture film?

A Yes.

Q Was there any event that brought this about?

A Just a change in my booking policy of the theater.

Q Was there any particular event that caused you to change your booking policy at that theater?

A I felt that it would be more viable as a—what some people would term a general release theater than it was as an adult theater.

Q Was there any objection by the City authorities to the nature of the film?

A No.

Q Was there any protest by the citizenry concerning the nature of the films which were being shown?

A Not to my recollection.

Q Did you ever appear at any meetings in which an objection was raised to the showing of adult films at that theater?

A No.

Q Is it your testimony that regular films were shown for the nine to ten months at that theater during the year's lease?

A Yes.

[22] Q At the end of the year's lease, did you cease operating the theater?

A I certainly did.

Q Was there a particular reason?

A Yes.

Q What was the reason?

A Because I was losing money hand over fist in that theater.

Q You say this was for a period of a year. What year was that?

A I don't remember, to tell you the truth.

Q Was it during the year 1981?

A No.

Q 1980?

A I don't know.

Q Was it closer to 1976 than 1982?

A I would think so.

Q Do you know the approximate year?

A No, I don't.

Q The North End Cinema, how long did that theater show film fare for persons other than adults?

A I would have guessed that during the last year that I operated the theater, it either operated with a split policy of general audience film, Sunday, Monday,

Tuesday and Wednesday, or Sunday, Monday, Tuesday, and adult films Wednesday-Saturday, or I operated with just general audience [23] films. But if it was originally strictly an adult policy, then it would have a split-week policy and then I had a general audience policy.

Q How many years were you the operator of the North End?

A A couple of years, I guess.

Q Was there a particular reason why you ceased operating the North End.

A There certainly was.

Q What was that reason?

A A problem with the landlord.

Q What kind of a problem was that?

A Well, there was a suit filed, and I can't tell you what the whole ramification of it was, but it was settled by relinquishing the theater.

Q Was there an unlawful detainer action?

A I don't think so.

Q What was the nature of it?

A I don't remember.

Q Was it in connection with the lease?

A It could have been.

Q What did they allege in the lawsuit that was a violation?

A I don't really remember.

Q Where was the lawsuit filed?

A Seattle.

Q Who was the landlord?

[24] A Theater Drapery Supply Company, I think.

Q How long was the lawsuit pending in the courts?

A I don't really remember.

Q Was there a compromise reached?

A Yes.

Q What was the tradeoff that you gave him in the compromise?

A The tradeoff was—there was actually a suit filed in regards to two theaters, one in Tacoma and one in

Seattle, and we maintained the one in Tacoma and relinquished the one in Seattle.

Q What kind of damages were they claiming?

MR. SMITH: Objection. I think this has gone too far. I don't think it's relevant to any discovery in connection with the zoning ordinance in Renton. I'll instruct him not to answer. The lawsuit itself can be obtained by you and you can review it to your heart's content.

Q Did any of your trouble with the landlord have to do with a zoning ordinance of the City of Seattle with relation to adult films?

A No.

Q Was the lawsuit a personal matter between you and the landlord and unrelated to governmental action?

MR. SMITH: Objection. I indicated the lawsuit is available to you if you want to pursue it. He doesn't [25] have these things and I don't think there is any relevance here to the present proceeding before the court, so I will instruct him not to answer.

MR. CLANCY: I'm searching his mind if he knows any information about these lawsuits. While it's true that I can probably get the papers and lawsuit by searching the record, it is also true that I can ask him questions concerning lawsuits in relation to adult motion picture theaters and determine whether or not those lawsuits are government-related.

MR. SMITH: I indicated to you that I don't think it is relevant in these proceedings. I don't think that your theory of saying you can ask him about any lawsuit involving any adult theater and whether or not they are government-related, carries water. So I will instruct him not to answer in view of the fact that that information is available to you as it is to anyone else. It is public record of King County.

Q What about the Greenwood Theater?

A Same one. The name has been changed. It was the North End Cinema Theater. The property was since sold and the name was changed to Greenwood.

Q Then my questions were to the North End?

A Which was named the Greenwood now.

Q So there are actually two theaters then that played films [26] which were not adult motion pictures?

A That's true.

Q What other theaters in your ten-theater chain show films which are not adult films?

A None.

Q Then these two theaters, the North End and the Rainier, are the only theaters which have been operated by you since 1976 which showed other than adult film; is that correct?

A There are two other theaters currently today that are not showing adult films.

Q Well, I was limiting the question to the ten.

A I would believe that that is true.

Q The two that you say are showing nonadult are the two here in Renton?

A Currently, yes.

Q So that during the period of 1976 to the present day, the only theaters which you have operated have all shown adult film fare except for those two?

A That's true.

Q Let's fix the time involved. Concerning the North End and the Greenwood Theater, do you recall approximately when you had the lease of that theater and when did you terminate the lease?

MR. SMITH: Objection. I'll instruct him not to [27] answer. There is no relevancy to the present lawsuit.

MR. CLANCY: The relevance has been established thus far that he operates ten theaters which show only adult motion picture films of the same type, and he's done that since 1976 except for those two theaters, the Greenwood and the Rainier. I am attempting to ascertain the approximate year in which it was terminated.

MR. SMITH: Object to the question. On page 4 Lines, 19, 20, 21 and 22 cover the Amendment and Supplemental Complaint where we indicate the lease agree-

ments to be entered into by the parties provide the premises to be used for the purpose of conducting adult motion picture theaters. We went on to the next paragraph which is beginning on Line 26 that from January 29, 1982, under the operation and management of Playtime Theaters, Inc., one of said theaters would continuously exhibit adult motion picture film to an adult public audience, but for the intents of your defendants, they would be doing so. I think we have clearly put our case in our pleadings that that is what he intends to do with this theater, one theater. I think that what he did in the past in the other two theaters, be it the Greenwood Theater formerly known as the North End Cinema, or the Rainier Theater, is wholly without the scope of this inquiry. I would object and instruct him not to answer.

[28] MR. CLANCY: Let me say this, Mr. Smith, that it may be that that is his present intention today by virtue of the fact that he's filed a lawsuit that is being resisted, but the City of Renton is not bound by his statement now that that's what he intends to do, particularly where the evidence shows that the only films that he has shown since 1976 have been adult motion picture films. Further, that when he showed nonadult motion picture films that were nonproductive, he then ceased operations or changed their fare. So I think it's entirely relevant and probative and a proper question.

MR. SMITH: We disagree. What he says now and the fact that he may have changed that, he can only change it to other than adult. The only factor that the ordinance addresses is adult theaters, so if he changes it to regular, how, then by your theory of rationale and reasoning, does that in any way affect the City of Renton because then he can operate. Secondly, you say he only has this experience with the other two theaters. He has obviously told you that he has the experience presently with two theaters in Renton. The fact that there is a lawsuit filed and what he changes or doesn't change, he has said that he is going to operate an adult theater. I think that's sufficient for the purposes of this lawsuit.

MR. CLANCY: Mr. Smith, I thought you were [29] directing my attention to the allegation that one of the said theaters would continuously operate on Page 4?

MR. SMITH: Correct.

MR. CLANCY: Now I'm making an inquiry as to whether or not it is reasonably probable that although he alleges that one of them will be, that more than likely he will not in the future.

MR. SMITH: Well, then, ask him that question, Mr. Clancy. Don't dance around the flagpole. Ask him a specific question. If you want to ask him if business circumstances are so bad that he is losing absolutely tons of money there as he indicated he was before, will he then change the film fare as projected now from regular film fare for a general audience to adult film fare. That's fine. He can say yes or no and the reasons why. That addresses the question. This business of what happened then, who, what year it was, really doesn't have any relevancy, and I would object.

MR. CLANCY: Let me just say this. The questions that are asked are framed by the person taking the deposition.

MR. SMITH: Correct.

MR. CLANCY: You can object on the grounds of relevancy. You objected that it wasn't a proper question and I'm saying that it is a proper question on this [30] discovery, and I was pointing to the allegation and why it was relevant.

MR. SMITH: I say that in the form it is asked, it is not relevant. My objection stands.

MR. CLANCY: Then you are instructing him not to answer?

MR. SMITH: I have instructed him not to answer in the form you asked, because it is not relevant.

MR. CLANCY: Well, it doesn't have to be relevant. It can lead to information in another regard.

MR. SMITH: Mr. Clancy, I have been practicing law almost as long as you have. I have been in Federal Court

almost as long as you have. I think I will practice law my way. You practice it your way. I stated my objection. If you don't like what I have done, you have your option to go to court and have this resolved. If the magistrate agrees with you, then fine. You will get your sanction at \$50 an hour.

MR. CLANCY: I didn't say sanction. I was just framing the rationale for my question.

Q In regard to the films that you select for your theaters, do you recall when it was that you changed your format from adult films to general run film at those two theaters?

MR. SMITH: Objection to any questions about [31] those two theaters beyond what has already been asked on the basis they are not relevant nor do they reasonably lead to the discovery of any evidence for the defense of this case.

Q When you were deciding on what films were to be shown at those two theaters when they were not showing adult motion picture films, did you approach the same distributors as for the nonadult motion picture film?

MR. SMITH: Same objection as before. I instruct him not to answer.

Q You say that you get your films from a number of distributors. Have you since 1976 gotten your distribution from those same distributors?

A You mean are they the same distributors today as they were in 1976?

Q Yes.

A I presume that some of them are, and some of them aren't.

Q Did you draw your films from the same sources in general?

MR. SMITH: Do you understand the question?

THE WITNESS: No. I don't understand that that is any different than the one I just answered.

Q Then what are the names of some of the distributors?

MR. SMITH: Objection. As previously stated, it is not relevant. It is not calculated to lead to information which is responsive to the issues framed by this lawsuit.

[32] MR. CLANCY: I take it from your objection that you object to giving the names of any of the distributors of his films?

MR. SMITH: That's correct. If you want to move to produce the documents that will list the names of the producers or distributors, we will object to that in the format of court.

Q With respect to Kukio Bay Properties, Inc., on Page 4, Line 7, of the original Complaint, you indicate that it is a Washington corporation. Is it a Washington State corporation?

A Yes.

Q When was it incorporated?

A I don't remember exactly.

Q Do you have the Articles of Incorporation for the Kukio Bay Properties, Inc., with you?

A Not in my possession.

Q Approximately how many years has it been operated as a corporation?

A About the same length as Playtime, I think.

Q Was it incorporated at or about the same time as Playtime Theaters, Inc.?

A I'm not positive. I don't think so.

Q Were you the incorporator?

A No.

[33] Q Who was the original incorporator?

A I don't remember the names right off now.

Q Who owns the stock in Kukio Bay Properties, Inc.?

A I do.

Q Do you own all of the stock?

A Yes.

Q When did you purchase the stock?

A Someplace in that period around '76, I think.

Q Who did you purchase the stock from?

A One of them, I think, was named Garnett Balsom and a fellow, I think, named Jack Sweeney.

Q What was the percentage of stock held by each of those individuals?

A I don't remember.

Q Did you purchase all of the stock at one time?

A No.

Q Which stock did you purchase first?

A I think Garnett Balsom's, but they were within a short period of time from one another or they may have been together. I don't really remember.

Q Do you remember which of those two had the greater amount of stock?

A No, I don't.

Q During the period 1976 to the present date, have you always been the sole stockholder of Kukio Bay Properties?

[34] Yes.

Q What type of business does Kukio Bay Properties do?

A Real Estate.

Q What is it authorized to do?

MR. SMITH: If you know.

A Purchase, hold and develop real estate.

Q What type of real estate does it purchase, hold and develop?

A No particular type, but the majority of it is motion picture theaters.

Q What are its holdings?

A Could you be more specific?

A You say the majority of its business is motion picture theater. What type of business does it do with motion picture theaters?

A Lease motion picture theaters.

Q Which motion picture theaters does it lease?

A Well, it leases the Renton Theater in Renton and the Roxy Theater in Renton, the Liberty Theater in Pasco, the Grand Theater in Bremerton, the Rex Theater

in Tacoma, the Community Theater in Tacoma. In fact, I think it leases—it either owns or leases all of the twelve theaters that were mentioned.

Q Which theaters does it own?

A Well, it owns the Point Roberts Theater in Point Roberts and [35] the Cinemond in Redmond and the Liberty Theater in Pasco, the Grand Theater in Bremerton, the Rex Theater in Tacoma, the two theaters in Renton, if I haven't mentioned those already. That's about it.

Q I thought originally what you said was that it leases the Renton and the Roxy?

A It owns them and leases them to Playtime. It either acquires leases and leases them back or purchases the property and is leasing them out.

Q So that all of those theaters it all owns, also leases them, too?

A Currently leases them to Playtime.

Q With respect to your allegation on Page 4 of the original Complaint, Line 11, on or about November 25, 1981, Kukio Bay Properties entered into a Purchase Agreement for \$800,000. What was the nature of that agreement?

MR. SMITH: If you remember.

A What do you mean?

Q On or about November the 25th of last year—

A I think it's November 25th of this year.

MR. SMITH: November 24 of 1982?

THE WITNESS: I'm sorry, November? I thought he was talking about January.

Q Concerning Kukio Bay Properties, you are the President of Kukio Bay Properties?

[36] Yes.

Q There are no other officers in the corporation?

A That's true.

Q Where is its principal place of doing business?

A 512 Second Avenue, Seattle, Washington.

Q How many persons does it employ?

A One.

Q Who is that person?

A Myself.

Q Are you a paid employee of the corporation?

A Yes, I am.

Q What is your title?

A President.

Q What payment do you receive as President?

A It varies from year to year.

Q How is your salary determined by the corporation?

A The stockholders and Directors have a meeting and determine what it is going to pay me that year.

Q Who are the stockholders and directors?

A I am.

Q When is the meeting held?

A I don't remember the exact date.

Q Has one been held this year?

A For this year?

Q Yes.

[37] A We operate on a fiscal year.

Q January to December?

A No.

Q July to July?

A No.

Q What is your fiscal year?

A March through the end of February.

Q Has that always been your fiscal year?

A I think so.

Q When was the determination made during the period March, 1981, through February 28, 1982, as to what your employment wages were?

A To tell you the truth, I don't remember because I haven't got the stuff here in front of me.

Q Was it made at the beginning of the year?

A Yes.

Q Are you the only person who is authorized to make decisions in Kukio Bay Properties, Inc.?

A Yes.

Q Getting back to Playtime Theaters, Inc., and the management and control of that corporation, of the four employees that you named, do any of those four employees have any degree of control over the corporation and business itself?

A No more than I delegate to them.

Q Have you delegated any authority to each of those four [38] employees?

MR. SMITH: Objection, asked and answered.

Q Have you then as to your answers, explained the limits of the authority of each of those four employees?

A I don't understand the question.

Q Concerning the bookkeeper Patty Jones, does she have any authority other than that other bookkeeper as an employee?

A That's her job.

Q Does Lisa have any authority in the advertising end of the business other than what you have related in your previous testimony?

A No.

Q Does Mr. Art Lowrie, the Business Operations Supervisor, does he have authority other than you have designated?

A No.

Q At the present time he doesn't do the films before they are shown?

A That's true.

Q Does he do any of the selection of the films that are to be shown at your theaters?

A No.

Q Are you the only person who makes that selection?

MR. SMITH: Objection; asked and answered. He told you he doesn't make the selection.

Q Then what is the contract that you have with Mr. Witte [39] concerning the films which are to be shown?

A What do you mean?

Q You say you did enter into a contract with him in March of this year?

A Right. Not March of this year. We entered into it. In November we discussed it and said that the beginning date would be January 1st.

Q January 1st of this year?

A That's right.

Q What was the agreement that was reached concerning that particular contract? What was he to do and what were you to do?

A He was to select the films to be exhibited in my theaters and make the deals with the distributors on what their share of the revenue would be.

Q Was there any restriction on his authority to select films?

A What do you mean?

Q Does he have a carte blanche to select any films?

A I don't understand what you are talking about. You are asking me whether he has the right to determine tomorrow I am going to play Walt Disney in the Palace Theater, he doesn't have that right.

Q Does he have the right to say he's going to supply you with Walt Disney?

A No, he doesn't.

[40] Q Who does select the nonadult films

A Sterling Recreation Organization, SRO.

Q Where are they located?

A In Bellevue.

Q Do you have a written contract with them?

A No, I don't think so.

Q When did you enter into the contract for those services?

A Sometime in January.

Q January of 1982?

A Yes.

Q Prior to that time, who selected your nonadult motion picture films?

A We hadn't been playing any nonadult motion picture films, but in the previous years when I had theaters

showing general release or nonadult films, Sterling has always done my film buying for me.

Q Where is Sterling located?

A In Bellevue.

Q Do you have the address?

A No, I don't. I used to work for them. I can tell you what the address was then. We used to have offices at 975 John Street.

Q Do they also supply adult motion picture film?

A They have exhibited adult motion picture film in their theaters from time to time.

[41] MR. SMITH: He asked you if they supply, meaning you.

THE WITNESS: No. They don't supply me with anything.

Q Then is the Sterling Recreation Organization, is that a theater?

A No, it's a chain of motion picture theaters.

Q Is it a chain which shows adult motion picture films at the present time?

A You mean once in a while or continuously?

MR. SMITH: Generally.

A I don't know that they have one on their screen today. They might have someplace.

Q Do you have a copy of the real estate Purchase Agreement that was entered into on or about the 25th of November 1981?

A Not in my possession.

Q Do you know where that agreement is located at the present time?

A No, I don't.

Q Are you one of the signers of the agreement?

A Yes, I am.

Q Would it be located at the principal place of business of the corporation?

A Possibly.

[42] Q You seem to indicate that there is a question in your mind as to where it is located?

A Where my office is located?

Q No, the real estate agreement.

A I don't know that it is in my office. It could be at my attorney's office.

Q Who is your attorney?

A Jack burns.

(Short recess.)

Q You have indicated that on Kukio Bay, you are the only officer and the only director; is that correct?

A Yes.

Q Does the same hold true for Playtime Theaters?

A Yes.

Q You are the sole officer and there are no directors?

A I'm the only director.

Q Let me ask you concerning your bank accounts for those corporations. Do you maintain separate bank accounts for the two corporations?

A Yes, I do.

Q Do you comingle the monies of one corporation with the other corporation?

MR. SMITH: Do you understand that term?

A Not to my knowledge.

Q All of the income of one corporation goes into its own [43] bank accounts?

A As far as I know.

Q All of the expenses of the individual corporations are paid out of the bank accounts of the corporations themselves?

A I would assume so.

Q Who are the persons who are authorized to write checks on the account of the Playtime Theaters Corporation?

A Are you asking me who can sign the checks or who can write the checks?

Q Who can sign the checks?

A Myself and Juanita Hamlin.

Q Juanita Hamlin is the—

MR. SMITH: Administrative assistant.

Q Do the checks require the signatures of both individuals?

A No.

Q Each have equal authority to sign?

A Each can be, yes.

Q Does that hold true for both of those corporations?

A Yes, it does.

Q The business of Kukio Bay Corporation, is that administered by these four individuals or any of those four?

A The bookkeeping aspects are taken care of by Patty Jones.

Q What other business of Kukio Bay is administered by any of those four individuals?

[44] A None.

Q What authority does Juanita Hamlin have in relation to the Kukio Bay Corporation?

A None except sign checks.

Q Who keeps the records for the Playtime Theaters, Inc. corporation?

A What kind of records?

Q Business records.

A Well, I don't understand what you mean.

Q What kind of records does Playtime Theaters, Inc. keep?

A I presume that it keeps the standard type of business records that any corporation would keep.

Q When you use the word "presume," do you mean you don't know?

A That means that that's my weak suit.

Q Would you explain what you mean by your weak suit?

A That I'm a person who in operating businesses, am not a bookkeeper, and I'm not real swift on how it is all done.

Q Are you saying you can't identify what any of the records of either of Playtime Theaters is?

A I don't know what you mean.

Q Who has charge of the correspondence?

A Well, I'm sure that it is taken care of, but exactly how, I don't know.

Q Do you originate correspondence yourself?

A Very little.

[45] Q Do you originate any correspondence?

A Very little.

Q What type of correspondence do you originate?

A It could be in thanking people who write letters who support my cause.

Q How do you transact your business, then?

A On the telephone mostly.

Q Well, concerning your negotiations for the Renton and Roxy Theaters, was any of that done by correspondence?

A No.

Q Was that all done by telephone?

A No.

Q How were the negotiations conducted?

A In person.

Q Was there any escrow entered into in connection with the properties?

A I don't know.

Q Did you ever sign any escrow papers?

A I wouldn't know an escrow paper if you showed it to me.

Q Did you sign any contractual agreements in relation to your purchase of the property?

A Yes.

Q Where did you sign those papers?

A In my attorney's office.

Q What attorney do you mean?

[46] A Mr. Burns.

Q Does he have the records of the purchase of the property?

A I don't know.

Q The copies that you signed, were they in his possession at that time?

A I think so.

Q When did you sign the documents?

A I don't know the exact date.

Q On the date you signed them, they were in his possession, were they not?

A Yes.

Q Do you know of anything that would remove those documents from his possession?

A He could have sent them to my office.

Q Did you make an inquiry of your office as to whether or not they were there?

A No.

Q In your original Complaint, you state on Page 5, Lines 18 through 21, that the defendants in their official capacities as aforesaid, have acted and/or threatened to act at plaintiffs' immediate and irreparable harm under color of authority. What type of irreparable harm?

MR. SMITH: We object to the reference to the original Complaint. The same paragraph is contained on Page 5 of the Amended and Supplemental Complaint which is the [47] only complaint that is now before the court, Lines 17 through 20.

MR. CLANCY: I note a difference between the documents, Mr. Smith. The first document is a verified document with Mr. Roger H. Forbes signing, Page 16, Lines 14 through 17, and Line 11, with his signature subscribed. It is a verified document although it has been superseded. I understand that you are saying it has been superseded?

MR. SMITH: Correct.

MR. CLANCY: It has no force and effect?

MR. SMITH: Essentially, it has no force and effect in terms of the issues before the court.

MR. CLANCY: But nevertheless, it would be a declaration of interest, would it not, because it was a document signed by him under oath where as I understand it, the Amended Complaint was verified by the attorney rather than the person whose deposition is being taken.

MR. SMITH: It was signed before a notary. It is more than just a verification.

MR. CLANCY: It was sworn before a notary, wasn't it?

MR. SMITH: Correct.

MR. CLANCY: And he says on Page 17, Lines 25 to 28, that he has read the Complaint to which this Affidavit is affixed and asserts that the factual [48] allegations contained therein are true and correct to the best of his information, knowledge and belief. As I read the Complaint, it is an affirmation on information and belief, but as sworn fact, so that the document which is sworn to, is a declaration of interest in which I am making inquiry into. Do you disagree with my right to examine him in that regard?

MR. SMITH: I don't disagree with your right to examine him about matters which you think are inconsistent with what he may have said or someone has said acting in the capacity of the corporation in the Amended and Supplemental Complaint, only in the sense that there may be some written declaration against the interest that he has exhibited in this lawsuit, but when you are talking about an allegation of the lawsuit which attacks the language of the original Complaint, I think you should refer to the Amended and Supplemental Complaint, unless there is other than a conclusionary assertion.

MR. CLANCY: The point I'm making is that he is swearing as a fact that there is irreparable harm.

MR. SMITH: You can ask him if he feels there is irreparable harm, and he says yes and he's under oath. He has sworn.

Q My previous question was, what kind of irreparable harm?

A Well, I have lost time. I have lost money. I have lost the [49] right to show constitutionally protected material.

Q You say you have lost time, you have lost money and you have lost the right to show constitutionally protected material?

A That's true.

Q Are there any other types of irreparable harm?

A That's the uppermost in my mind.

Q With respect to the time that you have lost, what do you mean you have lost time?

A A waste of time for me sitting here. That's money to me, also.

Q What do you value that time that you have lost here? How do you rate it, at so much an hour?

A No, because my life is only so long. I can't put any value on it.

Q Are you talking about the personal time that you put in on this project?

A That's right.

Q Would you give me an example of the amount of time that you have put in on this project and have lost that is irreparable harm?

A You want the amount of time?

Q Yes.

MR. SMITH: That's irreparable harm.

A Well, in my eyes, if it's five minutes or five days or five [50] years that I am kept from showing the type of material that I show in my theaters, that is lost.

Q When you say if you are kept from showing the type of material in your theaters, are you referring to the type of material that you have regularly been showing at those theaters since 1976?

A That's true.

Q I take it that to mean then representative of your loss would be your inability to show those particular films?

A Those films that are protected by the Constitution, that's right, that I have freely exhibited in this State since 1976.

Q But that's the type of films that you are saying you had a right to show at the theaters?

A That's right.

Q That is the type of film that you intend to show at the Roxy and the Renton?

A I intend to show that film at least in one of those theaters.

Q You mean that type of film or that film?

A That type of film.

Q When you say you are going to show it at one of the theaters, which theater is that?

A I would expect it to be the Renton.

Q Has that decision been made yet?

[51] A It's been made in my mind.

Q Then the decision in your mind is that you are going to show an adult film at the Renton?

A At the Renton.

Q And you are not going to show adult films at the Roxy?

A That's true.

Q With respect to your testimony in the two theaters previously mentioned, the Rainier and the Greenwood, your experience in the past has been that when you show nonadult film fare, it is not profitable; that is correct, is it not?

A That's not what I said.

Q What did you say in relation to those?

A I said that was true with the Rainier Theater but it was true on either policy at the Rainier Theater.

Q How about the Greenwood Theater, was there a different consideration there?

MR. SMITH: You mean the North End Cinema?

Q North End Cinema. Did you find that by showing nonadult motion picture films it was unprofitable?

A No, I didn't.

Q Did you find that it was profitable?

A I think it was profitable, yes.

Q Was it as profitable as at the Greenwood Theater? Did you find it to be as profitable to show nonadult motion pictures as to show adult motion pictures?

[52] A I did not have enough experience to be able to say over a long run whether that would be true or not. Looks like it could be.

Q What period of time are you talking about in your experience?

A I would guess probably two or three months.

Q How long did you have the Greenwood Theater?

A Two or three years, I think.

Q Was it only for that two- or three-month period that you showed nonadult motion pictures?

A Yes.

Q During what portion of that three-year period did you show nonadult motion pictures?

A At the end.

Q Do your records in relation to those shown indicate that you had any loss in revenues when you switched over from adult to nonadult motion picture films?

A Yes.

Q How was it reflected in there?

A Well, in that the policy of the theater was totally different under a general audience policy than it was under an adult policy.

Q Would you explain that?

A In that because of the location of the theater and the possibility of buying power for general audience films, [53] it was playing last-run films because that's all you could acquire there, and the admission price was substantially less. So the gross was substantially less, also.

Q Are you saying that your gross did drop when you changed from adult film fare to nonadult film fare?

A Yes.

Q I thought you had said previously that there was no change?

A There was a difference in gross.

Q Pardon me?

A There was a difference in the gross, but there is a number of other things that have to be taken into consid-

eration on the overall possibility of a motion picture theater.

Q Such as?

A In that if it is a general audience theater and it has a low admission price, you also have a higher concession take. So if you want to be fair, you have to take the whole thing in perspective.

Q Then are you saying that your income—

A You have to look—

Q If your income, although it dropped in gross from the admission, it picked up on the sale of concessions and that as a result of both of those sources of revenue, it equaled the income from your adult?

A I don't know that to be true because it wasn't a long enough period to be able to tell.

[54] Q Was it close to the income?

A I still say there wasn't enough time to be able to tell because you have to take it over a longer period of time than two or three months.

Q From just examining the box office receipts from the admission alone, has it been your experience that there is a marked drop in revenues of the theater when you switch from adult motion picture films to nonadult motion picture films?

A That wasn't true with the Rainier Theater. In fact, it was just the opposite, but it still was not enough to make the net.

Q Then you are saying that in the case of the Rainier Theater, your box office went up?

A With general admissions.

Q How long had you had the Rainier Theater?

MR. BURNS: The question has been asked and answered a long time ago.

Q My recollection of the testimony was you had it at least for a year and the nonadult was shown at the beginning; is that correct?

A No, the adult was shown at the beginning.

Q The adult was shown at the beginning for two or three months?

A Something like that.

[55] Q Then the nine to ten months was—

A A general audience.

Q Then the general audience fare for nonadult film was at least equal to that which you had received for the adult film; is that correct?

A In that situation.

Q Was there anything peculiar about that position, that situation that wouldn't apply elsewhere?

A I've never seen it happen before.

Q From your experience, you say that it doesn't happen like that?

A With my experience in the motion picture industry, I have never seen that happen before.

Q What has your experience shown then from your experience in the motion picture industry?

MR. BURNS: With respect to what? He's had a lot of experience in the motion picture industry. I object to the form of the question.

MR. CLANCY: He had just stated that the situation which existed at the Rainier Theater was such that the box office receipts for nonadult motion picture films was greater than for adult motion picture films in the situation in which there was a year's lease and in which films were shown during the first two or three months and nonadult films shown for the balance of the year, [56] or nine months. He then stated that his experience had shown that that did not exist as the usual result.

Q Based upon your experience, what have been the results that you have seen in relation to a comparison of the box office receipts?

MR. BURNS: Isn't it obvious? It's just the opposite of what happened at the Rainier Cinema. He said that's not been his experience. Isn't it obvious?

MR. CLANCY: It may be to you, but I'm asking him to tell me what his experience is.

MR. BURNS: I thought he had.

Q What has been your experience in that regard?

A My experience has been in every theater that I am aware of or I have operated that the box office results go up on an adult policy and down on a general release policy.

Q What theaters are you considering when you make that statement?

A I would take into consideration my experience with—the one that comes most to mind happens to be a recent acquisition which would be the Cinemond in Redmond.

Q How long have you owned the Redmond?

A Since January 1st.

Q Are you showing regular—

A I have never shown regular films there.

Q What type of films are you showing there now?

[57] A I show adult films there.

Q How was your experience related to the Cinemond?

A In that the reason that I was able to acquire the theater is that they no longer could gross any money in it showing general admission films.

Q Are you saying that you got the theater at a bargain price because it wasn't producing?

MR. BURNS: That isn't what he said, Mr. Clancy. You are misconstruing his testimony. Don't put words in his mouth.

MR. CLANCY: He is an employee of the plaintiffs in this action, is he not?

MR. BURNS: Don't misconstrue his testimony.

MR. CLANCY: Well, if I have interpreted his testimony incorrect, he can say that I have interpreted it incorrectly.

Q Mr. Forbes, are you the owner of the Redmond theater, the Cinemond?

A I am today.

Q At the time you purchased it—

MR. BURNS: Excuse me a moment.

(Discussion off the record.)

A I presume that when you asked me if I was the owner that you were referring to the corporation which owns the property.

[58] Q Yes.

A So when you said me, you were actually asking the corporation; is that true?

Q That's right. Kukio Bay—

A Owns the property.

Q And you own all the stock and are the director and officer?

A Right.

Q In that capacity, when you purchased the Cinemond, is it your testimony that it was losing money at that time?

A That's what the parties told me who were selling me the property, yes.

Q What else did they tell you about the box office experience of that theater in the past which would relate to your testimony here?

A That competition had destroyed, if for no better word, the business they were doing at the Cinemond playing general audience films.

Q Are you saying that they could not meet operating expenses?

MR. BURNS: Objection. That isn't what he said. It's a mischaracterization of his testimony.

Q Did the owner tell you that business was down?

A Yes.

Q Did he tell you that business was down to the point where he was not making operating expenses?

A I think he stated that.

[59] Q Did he tell you what his profit at that theater had been in the previous year?

A No.

Q Do you know what the nature of his profit was during the previous year?

A No, I don't.

Q Then when you make the comparison, would your grosses now at the Redmond with what was brought in during the past, what figures do you use on the previous operation for that comparison?

A Well, I don't use any figures in particular except in the conversations that I have had with him, he would express the fact that I was doing better than he had.

Q Have you had conversations with him since you purchased the property?

A Yes.

Q In those conversations, he has given you some indication as to what revenues he was able to produce before your operation began; is that correct?

A That's true.

Q What type of conversation was it, if you recall?

A I don't.

Q Did he give you any specific figures concerning what his grosses were?

A No, he didn't.

[60] Q Did you tell him what your grosses were under the new operation?

A Possibly in some general terms.

Q When you say possibly, are you saying that you do not recall whether or not you told him?

A I don't think that I gave him exact figures.

Q Do you recall giving him any figures?

A Yes.

Q What figures did you give him?

MR. BURNS: I object. What figures he gave him have no relevance to any issue in this lawsuit. I'll instruct him not to answer.

MR. CLANCY: Well, the relevancy is going into the question of damages and what damages he has suffered at Renton by virtue of the fact that he was forced to show nonadult motion picture films. Now he has sworn in the original Complaint that there was irreparable harm and I'm attempting to determine the amount or nature of the harm that he's talking about. His previous

expression was as to the receipts from each of the operations, and that's what I'm attempting to get into so that I can determine the nature of the damages.

MR. BURNS: Well, if you want to ask him what his damages are at the Renton theaters, that's appropriate. What he grosses at the Redmond theater has no relationship [61] to what damages he may or may not have at the Renton theaters. I'll instruct him not to answer.

MR. CLANCY: Yes, but the comparison of experience at the Renton between grosses for the two types of films would have some relevancy in this lawsuit.

MR. BURNS: Only if you can show that the markets are comparable.

Q Do you regard the market different in Redmond than it is in Renton?

A Yes.

Q What's the difference in the market?

A I think that there is a larger drawing area in the South End of the City of Seattle, and I can predicate that on the other theaters, the general release theaters that are located down here versus the general release theaters that are located on the East Side.

Q I'm not familiar with the area. Are you talking about the Renton area?

A The Renton area, yes, the number of general release theaters down here and the amounts they gross versus the general release theaters that are located on the East Side and the amount they gross.

Q On the East Side, is that Redmond?

A That's Redmond, yes. So I would say that there is a greater market in the South End than there is on the East Side.

[62] Q Is that the only market difference between the two theaters?

A So far as I can tell.

Q So if I understand your testimony, you are saying that in Renton, they are going to be drawing from a

larger geographical area for that type of film than in Redmond?

A That's what I would expect.

Q Does that apply to both nonadult and adult?

A I think that that is true.

Q Are you saying that in Renton, you will have a larger geographical audience for your adult films than you would have in Redmond for the same type of film?

A I think there is a larger market in the Renton area, the South End of what I might want to call Seattle, but even as a separate city, Renton, but the drawing area for Renton is larger than the East Side or the theater that's located in Redmond.

Q Does that apply for both types of film, for adult and nonadult?

A Well, the market for general release film is more cut up here in the South End. There are more theaters showing the same picture than there are on the East Side.

Q So you are saying that the drawing audience for nonadult films would be greater in Redmond than here?

A I don't think so. You'd have to look at a map and then I [63] could probably explain to you what the distribution pattern is on general release film and how it is done and how much they gross.

Q I suppose you are contrasting Redmond with Renton when you are showing the same identical nonadult film?

A Nonadult? Why don't we talk about adult?

Q For nonadult film, is there going to be a difference in the audience that you draw from and your receipts?

MR. BURNS: I'm going to object to the form of the question. We aren't talking about patterns for general release films in the Greater Seattle Area between the East Side and the South End of town. That has nothing to do with this lawsuit. Any hypothetical is not designed to lead to discovery of any relevant or admissible evidence with respect to this lawsuit, Mr. Clancy.

MR. CLANCY: Are you objecting then to an inquiry into the box office experience in Redmond as related to this lawsuit?

MR. BURNS: Yes.

MR. CLANCY: You are instructing him not to answer on that ground?

MR. BURNS: Yes.

MR. CLANCY: Then you have to strike from your experience the Redmond situation because you can't compare that.

[64] MR. BURNS: Mr. Clancy, he doesn't have to strike anything from his experience. I object to the form of the question, Mr. Clancy. I instruct him not to answer. You are not going to argue with this witness. He doesn't have to strike anything from his experience.

Q Let me ask it then in a more acceptable form. You stated that you expect irreparable harm as a result of the fact that you can't show adult films here in Renton?

A Yes.

Q You said that your experience shows that when you have gone from adult films to nonadult film, the box office drops; is that correct?

A I didn't say that at all.

Q What was your previous testimony then in relation to your experience of the change in the type of film from nonadult film to adult film?

MR. BURNS: Objection. It's been asked and answered. It's on the record. You have got it. Let's go on.

(Discussion off the record.)

Q You stated that your irreparable harm is that you cannot show adult motion picture films in the City of Renton and that has caused you harm. What type of harm are you talking about? Is it financial?

A Well, there is irreparable harm in my First Amendment right [65] to show that material, so by forbidding me to show it for one minute is causing the irreparable harm.

Q Then are you saying that no part of that irreparable harm is a loss in box office receipts?

A I am sure that that is harm that can be corrected.

Q That is damages?

A I think so.

Q Then what damages have you suffered in that regard?

A The amount of damages?

Q Yes.

A Well, right now I would guess off the top of my head the losses are running at the rate of about \$5,000 a week.

Q Is that for the Renton Theater or the Roxy?

A That's probably for both theaters combined.

Q Would you explain that?

A Would I explain?

Q Well, my understanding was that only one of those theaters are you going to show adult motion picture films?

A That's right.

Q Which theater is that?

A The Renton.

Q Has any part of that \$5,000 a week been due to a loss at the Roxy?

A Let me say that the policy that I have in mind for the Roxy I've divided because I am using the policy on both [66] sides of the street. If I were using it on just one side of the street, then I could foreseeably have gotten to the point now where I could at least break even at the Roxy but because I have divided the market for the type of policy that I have in mind for the Roxy, I have suffered a loss on both sides of the street. Does that make any sense to you?

Q Well, would you explain the policy you are talking about?

A The policy is that for a general audience, the admission price is \$1.99 for adults and 99 cents for children, and if I have one theater with that policy in it, I prob-

ably could be almost to the break-even point there, but because I have two theaters with that policy, I have divided my market basically and I am sustaining a loss on both sides of the street. That is because the Roxy and the Renton are right across the street from one another. That's what I'm talking about. So if I had adult films on one side of the street today, one, I would probably be making a profit there, and two, if I have this other policy across the street at the Roxy, it would probably be at least to a break-even point.

Q Assuming that you had a general admission price of \$1.99 and 99 cents, you would have concessions also?

A That's right.

Q Then would you still be operating the Roxy at a loss in [67] relation to operating costs?

A I don't know.

Q Has your experience been that a theater like the Roxy can be operated to show nonadult picture films and be at a break-even point from the profit standpoint?

A I don't know. I would feel that that's what I'll be able to do, but I don't know. I haven't had the opportunity to do it.

Q Has all of your experience in the theater business been practical, for example, going back to the age of sixteen, that you have been involved in motion picture affairs since that time?

A Yes.

Q Have you had any formal schooling in that regard?

A The formal schooling that I have had has been working for probably the best exhibitors of motion pictures in the United States.

Q What is your experience in that regard, your employment?

A I have done or had jobs in the capacity of from doorman to manager of theaters, from film booker, film buyer. There are few aspects of the motion picture industry as far as exhibition goes, that I haven't been involved in.

Q What is your formal education?

A High school.

[68] Q Where did you go to high school?

A Garfield in Seattle.

Q When did you graduate from high school?

A 1960.

Q What was your first employment in 1960?

A Well, I started in motion picture theaters before I graduated from high school.

Q What motion picture theater was that?

A I started—I don't know now.

MR. BURNS: Mr. Clancy, we already when through this and Mr. Smith objected, if you recall, and to the extent that he objected, I would renew the objection. We don't believe that going through a detailed history of every theater that Mr. Forbes worked in for the past 20 years or 25 years is relevant to any issue in this litigation.

MR. CLANCY: That's not my point. My relevancy is based upon his expectation of damage and his business acumen, his degree of education and his practical experience in the business.

MR. BURNS: He has answered all of those questions.

MR. CLANCY: Generally. Now I specifically want to know what his experience is.

MR. BURNS: He told you what his experience is, generally.

[69] MR. CLANCY: Well, I want to be specific and I'm going back to the point in his experience beginning with when he got out of high school and the nature of his business, what the extent of his expertise has been as a practical matter in the industry upon which he is basing his judgments on loss and this lawsuit.

MR. BARBER: If he is going to be presented as an expert and his expertise is going to be a foundation for that, it will be a line of inquiry into his experience.

MR. BURNS: That may be, but there has been no indication that he will be our witness on damages, has there?

MR. CLANCY: There is a declaration in here, that he has sworn that as a plaintiff in this action, he has suffered irreparable harm and damage. He himself says "I know facts and these have brought about irreparable damage or harm." So now I am going back and asking him what that harm is.

MR. BURNS: He has told you what the harm is which is denial of his First Amendment Rights, Mr. Clancy.

MR. CLANCY: I'm talking about monetary damages. If you want to instruct him not to answer, we'll go on from there.

MR. BURNS: Why don't you go ahead. Let's try to speed this up.

MR. CLANCY: Well, it's not being very helpful to [70] intervene here.

MR. BURNS: If you ask relevant questions, we could get this done a lot faster.

MR. CLANCY: If it's not relevant and you think you want to challenge it, you can instruct him not to answer.

MR. BURNS: I will and I have. I want to give you all the latitude possible, but I still want to get this done in a reasonably prudent amount of time.

MR. CLANCY: Are you instructing him not to answer?

MR. BURNS: No, I'm not instructing him not to answer.

Q Going back to your high school then, would you just briefly recite what your experience has been as a businessman in this field of motion pictures on which you rely in making your determination that there is financial damage occasioned by this ordinance in the City of Renton's action?

MR. BURNS: If it goes back to when you were sixteen years old.

Q Just tally it off as you want to, you went from where to where and what experience you've had.

MR. BURNS: That's a different question, Mr. Clancy.

[71] Q You said prior to high school, you were employed in the motion picture business. What was that employment, for how long and what did you do?

A I was originally employed—my first position was as a doorman at the Coliseum Theater when I was sixteen years old which was probably for a period of about six months. I returned to employment by the same corporation when I was eighteen years old as night manager of the Coliseum Theater. I moved from there to the assistant manager of the Paramount Theater and probably spent a year and a half with them at that time. Then there was a period of time that I worked for my father in a restaurant. Then I went to Boise, Idaho, and worked over there for two years managing a couple of drive-in theaters. I returned to Seattle, spent another little period in the restaurant business, then the majority of the time I worked for SRO which was five years, which I spent as a film buyer and booker. I then took a position working for a company that was operating the adult theaters in Seattle and spent five years in that. Then I formed my own corporation in 1976.

Q Of all your employment, how much of it dealt with employment in connection with adult motion picture theaters?

A 1971 forward.

Q Your first was that five-year stand prior to your going out [72] on your own; is that correct?

A Yes.

Q Who was that with?

A Who was that with?

Q Yes.

A The people that owned the theaters here in Seattle.

Q Which theater was that?

A I don't remember the name of the corporation.

Q What was the name of the theater?

A Garden Theater in Seattle.

Q Were you five years employed by the Garden Theater?

A And other theaters that those people owned, yes.

Q What were the other theaters that they owned?

A They had the Embassy, the New Paris, the Rivoli, and I don't remember what else.

Q Were all of those theaters owned by one corporation?

A I don't know for sure.

Q Were you paid by the corporation or the theater itself?

A I don't remember.

Q What position did you hold at each one of those theaters?

A Manager.

Q In what order?

A I don't remember.

Q What was the first of the theaters in Seattle?

A The Garden.

[73] Q What was the next one?

A I don't remember in what order they came.

Q When you ceased your employment with the Garden Theater, where did you go?

A I acquired it.

Q Was that the last theater that you operated before you went out on your own?

A No. I operated it on my own.

Q When were you employed by the Embassy Theater?

A I don't remember the period.

Q Was it prior to the Garden Theater?

A No.

Q Was it after the Garden Theater?

A Yes, in conjunction with.

Q At the time you owned the Garden Theater, were you also manager of the Embassy Theater?

A Probably also owned it at the same time.

Q How about the other two theaters that you were manager of during that five-year period that you mentioned? When did you become the manager of those theaters?

A I don't remember.

Q Did you also own those theaters?

A Some of them at a later date and some of them not at all.

Q Were they owned by you personally or did other people have an ownership in the theater?

[74] A They were owned by other people before I acquired them.

Q What other evidence of irreparable harm or damage were you referring to in that original Complaint when you signed it?

A I think I covered it.

Q Then you said there is a \$5,000 loss?

A Per week.

Q That's as to both theaters?

A I would guess that.

Q Is that a guess as to the \$5,000 or how do you come by that?

A It's a guess. We can probably substantiate it from the profit and loss statements of the theaters.

Q In making that determination of \$5,000, did you actually go through a mathematical determination to arrive at that \$5,000 figure?

A I think those are the figures that I have seen on our profit and loss statements.

Q Where are those profit and loss statements at the present time?

A They are in my office.

Q Have you brought them with you?

A No, I haven't.

Q The Subpoena informed you that you were to bring such papers with you, did it not?

MR. BURNS: Mr. Clancy, the Subpoena was directed to [75] Roger Forbes. The Subpoena was not directed to the corporations. The proper procedure under the Federal Rules of Civil Procedure to secure documents from a party is to serve a Request for Production of Documents which is returnable in 30 days. 30 days have not elapsed since the service of that document.

MR. CLANCY: It was my understanding that Mr. Forbes was testifying that those documents were under his control.

MR. BURNS: Those documents belong to the corporations, not to Mr. Forbes individually. You have only subpoenaed Mr. Forbes individually. You can't subpoena a corporation. You can subpoena management agents if you properly designate what matters they are to testify to.

MR. CLANCY: I understood his testimony to be that the \$5,000 a week was derived from a profit and loss statement that was in his possession and control and I was asking if he had brought it with him because it was in his possession or control and he said he hadn't brought it with him.

MR. BURNS: It is not in his possession or control. It is in the possession or control of the corporation, not his personal possession.

MR. BARBER: It should be noted that the Notices [76] of the Subpoena also were for Mr. Forbes individually and as President of those corporations.

MR. BURNS: But you don't get documents from a corporation by serving a Subpoena. If you do serve a Subpoena, it is to be treated as a Request for Production of Documents. You have not complied with the rules, Mr. Clancy.

Q Have you brought with you any other evidence of the damages suffered?

A No.

Q Can you tell me then from your own knowledge of those damages, what goes into the determination of that \$5,000 a week? How was that \$5,000 a week arrived at? Do you know any of the figures yourself now personally?

A I can't give you the exact figures, no.

Q Well, can you give me any indication of the manner in which those damages were calculated?

A Well, you take the expenses for operating the theater and you subtract them from the gross and it leaves

you with the amount that you didn't take in to cover the expenses and that's how we determined the damages.

Q Are you saying that you are now losing \$5,000 a week from the operation?

A That's right.

Q What are your operating expenses that you take into [77] consideration in connection with your gross?

A You take into consideration the rent, the payroll, the advertising and the rest of the miscellaneous expenses, the film cost, insurance, utilities.

Q From your experience, what would you expect those bills to be if you hadn't gone forward and shown adult motion picture films at those theaters?

A I would expect a gross in the Renton Theater would be someplace between five and six thousand dollars a week.

Q If that were five to six thousand dollars at the Renton, what would be the Roxy?

A Twenty-five hundred to three thousand dollars.

Q Is there any relationship that you have arrived at or shown by those figures, namely that the adult receipts would be twice what the regular would be for nonadult?

MR. BURNS: Do you understand the question?

THE WITNESS: I have a vague knowledge or indication in my mind of what I think he's driving at.

MR. BURNS: If you don't understand, ask him to repeat it.

A Tell me exactly what you want to know.

Q I notice that the gross for adults is twice your expected gross, twice what you would expect to be for nonadults?

A Right.

Q Is that some type of a factor that you have arrived at?

[78] A I try to compare this area with another area and if those things are true, then that's what the numbers will turn out to be.

Q Has that been your experience, that that is actually a two to one factor?

A It's not determined that way.

Q Is it just a coincidence that the expected gross for the Renton is twice the expected gross for the nonadult?

A Yes.

Q Then in trying to explain the increments that went into those two figures, would you then explain how you arrived at each of those?

A All right. I look at the Renton market or the South End of King County, whatever you want to call it, as being similar to the market of Spokane. The theater I have in Spokane grosses between five and six thousand dollars a week. Thus I would expect an adult theater in South King County or Renton to gross the same amount of money because you play to roughly the same kind of market. General release in the Eighties, the numbers I arrived at there are numbers that were given to me by the people who were booking the theater for me, SRO.

Q Are you saying that Spokane draws comparable?

A I would think so, that Spokane would be a comparable market to this area.

[79] Q Does Spokane exhibit adult film fare at the present time?

A Right.

Q You say that based upon your expected growth of five to six thousand at Spokane, you say you should expect it here?

A Yes.

Q Then how about the twenty-five hundred to three thousand dollars, how did you arrive at that figure?

A That figure was supplied to me by the people who were booking the theater for me, the theaters, the Roxy and the Renton, by SRO as to what I could expect to gross under that policy in that house.

Q But that had no relation to the Spokane Theater?

A No.

Q Is that based upon the fact that that would be expected as a gross of any theater in this area for showing that type of film?

A It depends on the policy of the theater.

Q What is the present gross at the Roxy Theater?

A About \$1100 a week.

Q Isn't it true that you could right now show any of the adult motion picture films if you so desired?

A I consider myself to be a law-abiding citizen. If I were to do that, I would then be breaking the law.

Q Well, isn't it your contention you would be shown that [80] you are not breaking the law in that you have that right to show those films at the present time?

A I do? Are you telling me that I wouldn't be cited for breaking the law if I went in there and showed them today?

Q Well, it was reported, I believe, that you indicated you were going to show Deep Throat and Devil in Miss Jones. Is that a correct statement?

A That's true.

Q Would Deep Throat and Devil in Miss Jones be the type of film that you would say was adult motion picture films to be shown at that theater?

A Yes.

Q Are you aware that the persons who assisted in the production of that film had been given a jail sentence under Federal law in connection with that film, as an obscene film?

MR. SMITH: Mr. Clancy, are you familiar with the fact that this is a community that is different than the community in Memphis, and under the Supreme Court Decision of Hamling, each community has the right to set the standards for itself and that those same films have been determined by a jury using the State of Washington law as community standards, not to be obscene. Do you know that, yes or no?

MR. CLANCY: It's not my deposition, Mr. Smith.

[81] MR. SMITH: Then I will object to him answering because it is not relevant unless you are prepared to admit and acknowledge that fact.

MR. CLANCY: In a deposition, you can object to the question or direct him not to answer.

MR. SMITH: I did both.

MR. CLANCY: You don't cross-examine the person who is asking the question.

MR. SMITH: I instruct him not to answer.

Q Mr. Forbes, I am going to go through a list of these items.

MR. SMITH: Which items?

MR. CLANCY: I am now referring to the Subpoena, the Deposition Subpoena to testify or produce documents, Items 1 through 11 on Page 1. Can we stipulate that he's read this document and he's been asked to produce Items 1 through 11 at this deposition?

MR. SMITH: We will stipulate that Mr. Forbes individually and corporately that a Subpoena in a Civil Action, No. C82-59M was served upon him on or about the 11th day of March, 1982, in which it was requested that he appear to have his deposition taken. Attached thereto was in essence a Subpoena Duces Tecum to produce the documents and records which must be done consistent with Rule 30 of the Civil Rules of Civil Procedure, that accordingly, that Rule 34 provides that under B, that the party upon [82] whom the request was served, shall serve a written response within 30 days after service of the Request. We ask the record to reflect that today is the 9th day and you are a couple of days premature. So to that extent, our response is that none of these records requested are present, none of them have been brought and that was done so on advice of counsel.

MR. CLANCY: The 9th day is what?

MR. SMITH: You are a couple of days premature.

MR. CLANCY: How many days premature?

MR. SMITH: If you served it on the 11th and this is the 9th, obviously it is not 30 days.

MR. CLANCY: That's under the 30-days rule?

MR. SMITH: That's correct, applicable under Rule 30 and 34 and which we told you about on March 11th.

Q Would you read Item 1?

MR. SMITH: We have produced none of the records set out by Items 1 through 11. Mr. Forbes has not done so upon advice of counsel.

Q Item 1, the Articles of Incorporation and all the Articles amended thereto for Playtime Theaters and Kukio Bay Properties, Inc., do you know where those documents are?

A No.

Q Are they in the possession of your attorney?

A I don't know.

[83] MR. SMITH: Mr. Clancy, we also filed a Response to the Subpoena Duces Tecum. After the 30 days have expired, as a matter of courtesy and not because we are required to do so, certain documents will be furnished you, including but not limited to those which are included in 1. If you will look at the response to the Subpoena Duces Tecum, we are telling you what we are not going to give you so that you can frame your issues and take it to court. Everything else other than specifically objected to will be produced as a matter of courtesy to you by Mr. Burns after the expiration of 30 days. Item 2, the books of account showing all capital investments and expenditures, do you know where those are located?

A I'll defer to Mr. Smith and Mr. Burns.

Q Are you saying that you won't give me an answer as to whether or not you know where they are located?

A I don't know.

Q Do you know where they are located?

A Not at this moment.

Q Item 3, the business records identifying all of the persons or entities owning stock in Playtime Theaters

and Kukio Bay Properties and the persons or entities holding the right to control the operation of the theater?

MR. SMITH: Mr. Clancy, all documents that are [84] required other than those specifically objected to, are in the possession of Mr. Jack Burns.

MR. CLANCY: Are you saying that all of these documents are?

MR. SMITH: All of the documents except those to which there is a specific objection, are in the possession of Mr. Jack Burns as attorney for the respective corporations.

MR. CLANCY: All right then, so that we will know regarding Items 1 to 11, would you tell me in relation to those Items 1 to 11, do you have Items 1 to 11 before you?

MR. SMITH: Except to the extent that they are specifically objected to and in response to your Subpoena Duces Tecum as set forth on Page 2. They are very, very specific. For instance, as to the Request No. 2, it calls for documents unrelated to the Roxy in Renton, plaintiffs object they are not relevant. That clearly sets forth what we are going to give you and what he would have in his possession.

MR. CLANCY: I'm asking about where the books of account are.

MR. SMITH: I said everything that it relates to the Request that we have not specifically objected to, are in the possession of Mr. Burns. Everything else [85] would be in the possession of the corporations involved in the case. Whether that would be at the office where the Palace is located or in Mr. Burns' office, they are still within the bosom of the corporation and the care, custody and control of said corporations.

Q So that we have the records straight, in relation to the Subpoena, just briefly take a look at Item 3, business records identifying, do you know where those records are?

A No.

Q Item 4, all leases, contracts, offers, or other writings of one or another nature by which Playtime Theaters and Kukio Bay properties and/or Roger H. Forbes claim or base an interest in the right to operate the Roxy Theater and Renton Theater, more particularly described in plaintiffs' Complaint. Do you know where those documents are?

A Not exactly.

MR. SMITH: As I indicated to you before, those categories of documents are within the bosom of Mr. Burns, 3 and 4.

Q Item 5, bank statements, ledger books, escrow agreements, cancelled checks, check stubs and checkbook registers showing all capital investments in the Roxy and Renton Theaters, more particularly described above. Do you know where those records are?

[86] A Not exactly.

Q Do you know where the bank statements are?

A Not exactly.

Q Do you know where the ledger books are?

A Not exactly.

Q Do you know where the escrow agreements are?

A Not for sure.

Q Are they at the principal place of business in Seattle, the address that was given to me earlier?

A Might be.

Q Are they in the possession of your attorney?

A Could be.

Q Are they in your possession?

A No.

Q Item 6, the names of all theaters which are owned, leased, or operated. Are there any other theaters which are owned, leased or operated by the plaintiffs Playtime Theaters, Inc., or Kukio Bay Properties or you other than the ones you have testified to?

A No.

Q Item 7, names of all motion pictures which were shown at the theaters owned by the plaintiff during the

period commencing November the 25th. Where would that information be?

A I don't know.

[87] MR. SMITH: As previously stated by Counsel, they are in the care, custody and control of the respective corporations involved and upon appropriate notice and an order of the court, we shall produce those.

Q Do you know where that possession is located? Are they at your office in Seattle?

A Could be.

MR. SMITH: They are at the office in Seattle.

Q Is there any other real estate that you do business at under Playtime and Kukio Bay?

A I have other real estate holdings.

Q No. Is there any other place in which you operate either those businesses than other than the principal place of business?

A No.

Q You have no other offices for either one of those corporations?

A No.

Q Do you have any other places where you keep the records other than at those offices?

A Yes.

Q What other places do you keep their records at other than at that main office?

A My accountant has records.

Q Where are those records kept?

[88] A Presumably his office.

Q Where is his office?

A In Seattle.

Q What's the name of your accountant?

A Benson and McLaughlin.

Q Other than the records that are kept by your accountant, are there any other places where the records of the corporations are kept?

A No.

Q Item 9, names and addresses of the distributors and licensors of the films, is that information kept at your main place of business?

A Some of it.

Q Where would the rest of it be?

A The buying and booking service.

Q Where would that place be?

A In California.

Q So it is in either of those two locations?

A Yes.

Q But some of it is at your place of business?

MR. SMITH: This relates to the period of time prior to January, 1982, and they are in the care, custody and control of the corporations and are on the premises of the corporate main office. Since January 1, 1982, the information you ask about distributors and licensors [89] would be in the care, custody and control of Mr. Richard Witte located at the premises of the Pussycat Theater in Hollywood.

Q Item 10 was all books, documents or things which may be introduced or used by you to establish facts to support your claim for damage or irreparable harm. Where would those books, documents or things be kept?

A This would either be at my offices or at my attorneys' offices.

Q Do you know what books, documents and things that the Subpoena refers to?

A I have a vague idea.

Q Would you explain your understanding of what it refers to?

A Well, I would presume that it is the records that we have to substantiate the claims.

Q You have actual records which will substantiate your claims, do you not?

A I think so.

Q You have been instructed by your attorney not to bring them here; is that correct?

A That's true.

Q Item 11, all books of account and records of whatever nature of Playtime Theater, Kukio Bay Properties, Inc. and Roger H. Forbes which project gross revenues, net [90] revenue, and damages alleged to have been or suffered by plaintiff. Would your answer to that be the same?

A Yes.

Q Your calculations and the documentary evidence you do have in your possession, do you not?

A I have it in my possession?

Q Yes.

A It's either in the offices of our corporation or in my attorney's office.

Q Your attorney just told you not to bring it to the deposition?

A Yes.

Q Mr. Forbes, could you tell us, please, who sold the Redmond Theater to you, the name and address?

A What's the name of the corporation we bought it from?

MR. SMITH: If you don't know, say you don't know.

A I don't know.

Q Has the title actually passed to you?

A As far as I know, to the corporation, Kukio Bay Properties.

Q Has the title to the Roxy Theater passed to the corporation?

A Yes, it has, to the best of my knowledge.

Q Can you give us the information of the seller and the address when you sign the deposition?

[91] A Yes.

Q Do you have that information in your possession?

MR. SMITH: It would be on the document that will be furnished after the expiration of the 30-day period by Mr. Burns as a matter of courtesy.

Q Who's the individual that you did business with in connection with the purchase of the theater?

A There was not one individual.

Q What were the names of the individuals that you did business with?

A McCray.

Q What's the first name?

A Bob and his wife.

Q Are there any other individuals that you did business with?

A No.

MR. BARBER: As I'm sure you are aware, under our Local Rules for District Court procedure, before we can go forward with the Motion to Compel Compliance for the documents that we have sought to have produced here at the deposition today, we are required to see if we can meet outside of the formal courtroom setting and reach some sort of an accommodation as to those items which you are objecting to production. I would like to see if there is a time that we can stipulate to which [92] would be convenient for both sides to sit down and meet to discuss your objections to our Request for Documents outlined in the Subpoena Duces Tecum.

MR. SMITH: I think it would be more appropriate to what degree do you feel that our objections are not well taken and to that degree that you prepare some pleadings directed to that. Then I think we are in a position to sit down with you, whether it would be one week or two weeks, and address the specific issues. We have told you why we think they are objectionable. Now what is your response? We cannot sit down with two or three days' notice. Is that correct, Jim?

MR. BURNS: Yes.

MR. SMITH: After you have furnished us with your revised Request or at least your response to our specific objections.

MR. CLANCY: All right. Why don't we adjourn the deposition upon the outcome of the settlement of this Subpoena Duces Tecum.

MR. SMITH: All right. No questions.

MR. CLANCY: The deposition is concluded and resume it depending upon the outcome of the settlement of the Subpoena Duces Tecum.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

—
No. C82-59M

PLAYTIME THEATERS, INC.,
a Washington corporation, *et al.*,
Plaintiff,

vs.

CITY OF RENTON, *et al.*,
Defendants.

—
DEPOSITION UPON ORAL EXAMINATION
OF ROGER H. FORBES

BE IT REMEMBERED that the Deposition Upon Oral Examination of ROGER H. FORBES, appearing as a witness at the instance of the defendants, was taken at 10604 Northeast 38th Place, Suite 105, Kirkland, Washington, beginning at the hour of 10:00 o'clock a.m., on May 27, 1982, before Robert C. Webber, Notary Public in and for the State of Washington;

APPEARANCES:

ROBERT E. SMITH and JACK R. BURNS, Attorneys at Law, appearing for and on behalf of the plaintiffs;

LAWRENCE J. WARREN, JAMES CLANCY and MARK BARBER, Attorneys at Law, appearing for and on behalf of the defendants;

WHEREUPON, the following proceedings were had and testimony taken, to-wit:

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[2] MR. WARREN: This is the deposition of Mr. Roger Forbes. I guess technically it is not a continuation, but a reconvening of Mr. Forbes' deposition. On the prior deposition, there had been a Subpoena Duces Tecum and for this deposition, it was basically a Subpoena Duces Tecum with respect to three or four items off of the original Subpoena. Is my understanding correct?

MR. BURNS: Yes.

MR. WARREN: Those were contained in Items, if I have the numbers correct, 5, 10 and 11 off of the first Subpoena, and that's all that is being produced today.

MR. SMITH: As per the request.

MR. WARREN: There was an additional item of any and all market analyses, solicited, sought or obtained. Is that also being produced today?

MR. SMITH: As Mr. Burns indicated, there are no such.

MR. WARREN: Our understanding was from our conversation that there may have been some and you are stating for the record now there are no market analyses?

MR. SMITH: Yes. What you are asking for is [3] market analyses solicited, sought or obtained by plaintiffs. That would exclude any seat of the pants market analyses which an individual seeking as an entrepreneur for the business in which he is connected, to look at and say, "Hey, I'm going to check the traffic patterns here."

MR. WARREN: For the record, I understand that the prior Subpoena has been objected to on a number of instances and any discussion of that is not truly the subject of today's deposition?

MR. SMITH: Right. In my opinion, the objections were discussed and merged into the Subpoena to which we have responded today. Of course, we have the additional grounds that under the Federal Rules of Civil Procedure, there must be a 30-day notice given and that they were called for a time several days prior to the expiration of the 30-day notice. Technically, any documentation furnished at the time of the original deposition

was gratuitous and voluntary and not in response to the Subpoena.

MR. WARREN: If my recollection from the prior deposition, having read it last night, is correct, there was an agreement that the requested information would either be objected to or produced within that 30-day period.

[4] MR. BURNS: And it was.

MR. WARREN: Your statement is that everything that has not been objected to has been produced or will be produced today?

MR. BURNS: Yes.

MR. SMITH: Having done all that, do you want to take a few minutes before we start and look at all this stuff?

MR. WARREN: I have a series of questions that I wish to inquire into before we get that far.

ROGER H. FORBES,

who having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WARREN:

Q Mr. Forbes, if any of the questions I ask are not clear to you and your attorneys don't object for some reason, let me know because I'm not trying to confuse you. This is a discovery deposition. I'm trying to elicit information so I may understand the facts in the case. Your deposition was taken previously in this case on April 9, 1982. Do you remember that?

A Yes.

Q Since that point in time, we have had produced for us, certain documents about your businesses. I'm asking you [5] these questions as the chief operating officer of Kukio Bay and Playtime. If I understand the documents correctly, you purchased through a stock purchase or

other means, the predecessor corporations to Kukio and Playtime. Is that a correct assumption?

A No, that's not.

Q Would you explain to me how you came by the predecessor corporations to Kukio and Playtime?

A If my memory serves me correct, they are both the same corporations. The only thing that was changed was the name.

Q You bought what was known as Peninsula Corporation, I believe?

A That's right.

Q And you changed the name of that to Kukio Bay?

A Right.

Q You purchased another corporation, the Gaiety, I believe?

A No.

Q What was the name of the prior corporation, do you recall?

A The corporation was originally called Gaiety Theaters, Inc., but it is the same corporation. It just had a name change.

Q You changed the name of that corporation to Playtime?

A Yes.

Q Let's explore for a second the relationship between [6] Kukio and Playtime. It is my understanding, and correct me if I'm wrong, that Kukio was basically a corporation that invests in real estate and its principal investments right now are a number of pieces of real estate that have theaters upon them. Is that a correct assumption?

A The majority of it, yes.

Q Is there other real estate in Kukio Bay other than real estate upon which theaters or their appurtenances such as parking lots sit?

A Yes.

Q Can you tell us what that is?

A There is an apartment building in Renton. There is some vacant land in Point Roberts. There is some vacant land on Aurora. There is a house in Port Roberts.

Q Are these other items of real estate contiguous to your theater properties?

A Not always.

Q So there is some real estate investments that are completely separate and apart from theater properties?

A Yes.

Q Kukio as a method of doing business has turned around and leased various properties to Playtime?

A Yes.

Q Is there any theater that Kukio Bay owns that is not leased to Playtime?

[7] A Not currently.

Q The two theaters that we have been discussing located in Renton is the Renton and the Roxy, have been leased by Kukio Bay to Playtime; is that right?

A Yes.

Q The lease rate is \$4,000 a month, if I understand?

A I guess that's right. I'm not sure.

Q I don't mean to misstate a fact. That's what I reviewed today from the documents that have been produced and if that is an incorrect statement, we will modify it later.

A If that's what the documents say, that must be what it is.

Q Has Playtime been paying the money to Kukio Bay each month for the lease?

A To the best of my knowledge.

Q Is Kukio Bay claiming any economic loss in this particular action because of the Renton ordinances outside of any attorney's fees that may have to be paid?

A I don't know.

Q Let's approach it from this standpoint. Do you know of any economic losses of Kukio Bay which would or could suffer because of these ordinances when you take

into account that they have been receiving the \$4,000-per-month rental on each theater?

A Well, I said to the best of my knowledge, but if—and I would say that because of the ordinances, it makes the [8] overall corporation that is leasing all of the theaters, makes it difficult to pay their bills.

Q That's playtime, though, is it not?

A Right, and part of those bills that are owing are for other properties. Whether Playtime is paying Kukio and keeping current in Renton or not in other areas, I'm not really sure.

Q What I'm trying to get at obviously is the loss then would fall into Playtime's pocket and then it would then owe money to Kukio?

A Right.

Q Do you believe that the terms of the lease as they exist on these two theaters are at the market rate, if you know?

A Absolutely.

Q That has been the effort that Kukio has taken in the past, is to have market rate leases?

A Yes.

Q Was there any efforts to lease the theaters to any other third parties outside of Playtime?

A Yes, there was.

Q Can you tell us what you did about trying to obtain third parties briefly, and maybe a couple of names of who you contacted?

A There was a discussion over leasing one of the theaters to Seven Gables Corporation.

[9] Q What came of that?

A Nothing.

Q Did it ever get beyond just the preliminary discussion?

A No.

Q Can you tell us if you recall why Seven Gables wasn't interested in the theater?

A Well, I can't tell you because I don't know what goes through their mind.

Q Did they express to you why or did they just say "No, we're not interested"?

A They approached me originally and I gave them the figure of what I felt was a fair rent, and that was the end of the discussion.

Q They didn't seem too excited about it?

A No, but they are paying similar figures in other areas.

Q Can you recall what figure you quoted them as a fair rent on the theater?

A \$4,000.

Q Mr. Forbes, obviously this controversy is about your desire to show what you have termed as adult motion pictures in one or both of the theaters in Renton. I would like to explore with you a little bit more how your chain of theaters operates and your film selection. I would like you to explain to me, if you could, how you schedule a film or someone in your corporation schedules [10] a film into a specific theater. Could you tell us how that is done?

A I don't do it.

Q Who does it for you?

A No one within my corporation does it.

Q We had some discussion previously about the Pussycat Theater and a gentleman down in the Pussycat Theater reviewed your films, a Dick Witte?

A Dick Witte is retained as the film buyer and booker for Playtime Theaters, Inc.

Q He also schedules which film is going to be played in which theater at various times?

A That's true.

Q You have no control over that?

A No.

Q And no knowledge of how it is done?

A No.

Q From your knowledge as the chief operating officer of Playtime, can you tell me whether or not any of the theaters have the same showing patterns, in other words, one movie will show in Theater A and Theater B at the same time. Do you know that?

A Yes.

Q Could you tell me if that happens?

A It does.

[11] Q Is it done as a matter of a pattern that you are aware of?

A I would assume that we are and when I say we are, Dick Witte and the people who work for me are working to put together the best units of theaters to exhibit the same motion picture at the same time to get the best coverage by the advertising campaign for your dollar spent.

Q Some movies as they come out, for example, might be hot items and might have a certain market appeal. Do you know whether there is an attempt to spot those movies in each one of your geographical locations at the same time?

MR. SMITH: Object to the term hot item. I don't think that's a word of art in the trade and ask that you rephrase the question. I instruct the witness not to answer.

* * *

[13] Q Mr. Forbes, are there certain movies in your industry that seem to draw better at or about the time of their release?

A Yes.

Q They have a particular drawing power at that time?

A Some of them have drawing power ten years later.

Q Do you know whether or not Mr. Witte attempts to book those items that might have particular market appeal because of their novelty or other reasons, into your theaters in some sort of a geographical manner, in other

[14] words, one in each city where you have a theater?

A I have no knowledge.

Q Do you have any knowledge as to whether or not that proves to be the case with a number of films, they end up being placed in each of the theaters that might be in a specific geographical location like one in Seattle, one in Pasco, one in Spokane, and so forth?

A I don't know.

Q Let me ask you this question, then. Is it true that eventually the films that are being shown throughout your system eventually are shown in each of your theaters?

A That is not necessarily true.

Q So there may be a film that's shown in Spokane that would not make it to the Redmond Theater?

A That's true.

Q You have no information about how the pattern is constructed to show those particular movies?

A No.

Q Do you have any knowledge, Mr. Forbes, of what movies were to follow in Renton after the Devil in Miss Jones and Deep Throat were to be shown in January?

A No, I don't.

Q No knowledge at all?

A No.

Q Who has that knowledge?

[15] A I imagine you would have to inquire of Mr. Witte.

Q From your knowledge of your theaters, would it be a fair statement that the majority of the films that were shown in Redmond would end up being shown in Renton if it was permitted to open?

A I would guess that would be true.

Q And a similar statement for, say, Spokane or the Seattle theaters, the majority of the films shown in those theaters would be shown in other theaters at some point in time?

A I don't know whether it would be shown in Renton or not.

Q The majority?

A I don't know.

Q You just don't know very much about this system?

A I don't know very much about the way he does it, no.

Q Do you keep track of what theaters are showing what films in your organization?

A I don't personally keep track of them.

Q Let's reflect back in time if we can to, say, December and January of 1981 and 1982 respectively when you were considering coming into the City of Renton and buying the two theaters. Did you make any sort of inquiry to the City as to whether or not they had an ordinance which might have prevented the showing of your adult motion pictures in the City of Renton?

[16] A I sure did.

Q You determined that there was an ordinance in effect at that time; is that correct?

A Yes.

Q Did you make any inquiries to the City of a formal nature to determine whether or not the enterprise which you were proposing would violate that ordinance?

A I didn't inquire of the City, no.

Q Your answer leaves me with the implication that you inquired of somebody else, is that the case?

A Normally, questions of legality are discussed with my attorneys.

Q Did you make any inquiries of a formal nature to the City of Renton outside of an application for a business license?

A Well, we certainly got a copy of their ordinance before we purchased the theaters, I would believe.

Q Did you discuss or inquire of the City about any other locations within the City Limits of the City of Renton outside of the location of the Renton and the Roxy Theaters?

A No.

Q Were any other locations considered at all?

A There aren't any other theaters available in Renton, to the best of my knowledge.

[17] Q Is it your statement that the only way you were coming into the City of Renton was that you would buy any existing theater?

A It is better to go out and purchase an existing theater than to build a new theater.

Q But that certainly is still a viable alternative, is it not, to build a theater at another location?

A In another location in Renton?

Q Right.

A It depends on whether there is a place that's available where the property could be purchased at a reasonable price and whether construction could be done to where you can get a return.

Q My question is, did you do that process at any point in time?

A We have since.

Q In Renton?

A Yes.

Q Can you tell me who has participated in that inquiry?

A I don't know the people's name right offhand.

Q As the Chief Executive Officer, have you hired any individuals to testify in your behalf concerning that information?

A I'm sure that there is somebody who has done that work, yes.

[18] Q You don't know their names?

A No.

Q Do you know the name of the organization?

A No.

Q Do you know the type of work that they do? Are they planners, engineers?

A They are in real estate.

Q Anyone else outside of an individual strictly in real estate?

A No.

Q When you say in real estate, are they strictly real estate agents or brokers or are they management consultants or what are their qualifications, do you know?

A I really don't know.

Q Who would know that information outside of yourself, Mr. Forbes?

A My attorneys.

MR. WARREN: Counsel, can we agree on the record that you will provide me with the names of those individuals?

MR. BURNS: If they are properly requested.

MR. WARREN: In other words, without the proper request, we are not going to get the information? I just want to know.

MR. SMITH: It falls within the same category, [19] the request for the map that your employee in the City prepared that was refused us at the time of the deposition.

MR. WARREN: That's argumentative, and I would ask the question again. I don't think names are protected information. Are we going to be provided with the names outside of a formal request and it can be answered with a simple yes or no.

MR. SMITH: I think the answer has been made for the record.

MR. WARREN: In other words, no answer is going to be given of a yes-or-no fashion?

MR. SMITH: It may not be what you choose, but I think the record speaks for itself.

(Discussion off the record.)

Q Just so I understand, Mr. Forbes, you have identified one individual that has some expertise in real estate that you believe that you paid some money to, to prepare—

A I have delegated that to my attorneys to pursue and they are doing it.

Q Have you been signing some checks for the preparation of this information?

A Well, I pay a great deal of money to my attorneys, and I presume that part of that will be paid out to these people.

[20] Q Just so I understand your answer, you have not been signing checks directly to these individuals but have been paying money to your attorneys for that purpose, you believe?

A That's right.

Q Mr. Forbes, let's try and discuss for a minute if we can the damages claim that you have asserted in this action. I seem to be a little confused about how the damages are to be arrived at. Reading your prior deposition, I was left with the impression that you were comparing the Renton Theater to the theater in Spokane. We had a discussion off the record that indicated there may be another method being used. Could you please educate me on the damages calculations, if you would, please, how are the calculations being done, what method is being used?

A Are you asking me—for one thing, I can't think of any way to compensate me for the loss of right to show protected material. I don't know how to tell you. There is no dollar-and-cents figure on that.

Q I presume at some point in time, your attorneys on your behalf are going to approach the court and say "We want to be awarded X number of dollars plus our attorney's fees for this action," and my inquiry to you is, do you know the method used to calculate the X number of dollars? Is it going to be a comparison of the profitability of [21] some of the theaters with a theater that was to show adult entertainment in the City of Renton?

A If you are talking about dollars and cents, in that regard I would presume that it will be based on the performance of the theater.

Q The performance of the theater based upon what standard? What are you using as the standard?

A This is what it does that it does today versus what it does after it is showing the type of material that we plan to show there.

Q So my understanding is, you are going to anticipate presenting your damage claim at some point later in time after these theaters have been allowed to operate, is that what you are saying?

A If I had a crystal ball, I would say that the time frame between a preliminary injunction and the final outcome of the case will be the right period.

Q Presume for the sake of this next question that you are not able to prevail on the preliminary injunction. Do you know whether there has been another calculation of damages done that uses some other standard outside of performance before and after the injunction?

A No.

Q No, you do not know, or no, there is not?

A I don't know.

[22] Q Has there been any calculations that you are aware of comparing any theater, other theater in your chain, against the Renton Theater for comparison's sake for damages?

A Well, there probably are in my own mind, but beyond that, no.

Q Do you believe in your own mind that you can somehow come to a damages calculation based upon your knowledge of some other theater in your chain versus this theater?

A I probably could, but I still believe the best method and the most fair and equitable one is the before-and-after performance of that theater itself.

Q If you are not able to use that measure, can you tell us what theater you would be comparing the Renton Theater with?

A The Dishman.

Q The Dishman is a theater that is located in Spokane?

A That's true.

Q Can you give me some idea about the Dishman Theater as to its location, within whatever metropolitan area it might be? Where is the Dishman Theater located?

A It is located in Spokane.

Q Is it in the downtown area or is it in a suburb?

A It's in a suburb.

Q What suburb is that?

A The Dishman suburb.

[23] Q How many seats does the Dishman Theater have?

A 400.

Q Can you explain to me the parking setup around the Dishman Theater? Is there on-site parking?

A More or less.

Q Can you explain "more or less" to me, please?

A Well, there is some parking adjacent to the theater which it shares with some other businesses.

Q Can you tell me how many parking spaces are available with that parking sharing arrangement?

A No, I can't.

Q Do you have some sort of an agreement with the adjoining businesses?

A I think so.

Q Is that a written agreement?

A Not to my knowledge.

Q Can you tell me if it is an oral agreement, if there is compensation paid for the parking sharing?

A No.

Q How many businesses share the parking, and give me some sort of an idea of the size of the parking, number of stalls or numbers of square feet, something of that nature?

A I really don't know to tell you the truth. There is probably parking in the immediate vicinity for a hundred cars.

[24] Q How many other businesses utilize that same parking area?

A I haven't been there for a period of time but I would imagine there are half a dozen, but I'm just guessing.

Q Do you have any knowledge of the time when those businesses would use the parking spaces? In other words, are they nine-to-five type businesses?

A Some of them are open before I am in the day and are open after I close.

Q What are the other type of businesses there, if you know?

A Well, there is a gun shop, there are taverns and there are restaurants.

Q Is there another theater in the locality showing adult motion pictures?

A Yes, there is.

Q How far is it?

A It is located in Downtown Spokane.

Q Can you give me some sort of an idea how far that is?

A I'm not very good on distances.

Q Can you tell me how long it would take to drive from one location to the other?

A 10 or 12 minutes is a guess.

Q Is there more than one adult motion picture theater in the area outside the one you discussed in Downtown Spokane?

A No.

[25] Q So in Spokane, it is limited to two theaters?

A Yes.

Q Let's discuss if we could the Redmond Theater for a few minutes. Can you tell me the size of that theater, the number of seats?

MR. SMITH: Objection as to materiality, but you may answer if you choose.

A What do you mean by size?

Q How many seats?

A I think there are about 300.

Q Can you tell me whether there is parking with the theater in Redmond?

A There is some shared parking in front of the theater.

Q How many stalls are there?

A I would guess that for all the businesses there, there may be 50 or 60. I don't really know.

Q What is the distance, if you know, in driving time or whatever measure you want to use, between the theater in Redmond and the next closest adult motion picture theater?

A Well, I would guess that the next closest one would have to be the Apple Theater on Boren in Downtown Seattle.

Q You seem familiar with the number of adult theaters in the King County locale. Could you tell me how many adult motion picture theaters that show primarily adult motion [26] pictures there are in the King County area here?

A I would have to sit here and try to figure how many there are. I don't know right off the top of my head.

Q You have what, four?

A Well, in King County we have the Cinemond, the Palace, the Embassy; then there's the Apple and the Mid-Town. What else is in King County? There is one in Des Moines. What have I missed?

Q Is there anything in the North End?

A The North End of the City?

Q Yes.

A We haven't gotten into the North End yet.

Q Let me ask you this question without asking you to divulge any big corporate secret. Could you tell me which of the theaters in your enterprise is the most profitable at the present time?

A Could I tell you?

Q Yes.

A I don't know which one is exactly. There is a number that are running neck and neck.

Q Could you tell me what the runners are then?

A The runners are the theater located at Third and Union, the Embassy, and the theater in Point Roberts, which is an interesting situation.

Q Could you tell me where Point Roberts is?

[27] A Point Roberts is a little tip of land that you have to go through Canada to get to, that's part of the State of Washington.

Q Up near Bellingham?

A Yes, around the Bay. In fact, everything that goes into Point Roberts, which has 250 people as a year-round population, comes from Canada.

Q Can you tell me about the Point Roberts theater, how large that theater is?

A A couple of hundred seats.

Q 200.

A 200.

Q Does that have its own parking?

A Yes.

Q Approximately how big?

A Probably parking for a hundred cars.

Q How far is that from Vancouver?

A Driving?

Q Sure.

A 20 minutes, 25 minutes, 30 minutes, someplace in there.

Q Maybe depending on how the border fellows are treating them that day?

A They just kind of wave them through.

Q You mentioned the Embassy. That is a theater that has been in existence for a long time, has it not?

[28] A Yes.

Q It is at Third and Union?

A Yes.

Q That's one of your more profitable enterprises. How many seats are in there?

A 600.

Q There is no outside parking for that theater, is there?

A That's true.

Q Can you tell me the average number of patrons that you draw, for example, at the Embassy? Is there

some sort of a routine? Do you draw the same audience that comes to theater films?

A Well, the type of patron who goes to the Embassy Theater varies greatly from the type of patron that goes to most of the other theaters, and it is a steady patronage, week in and week out.

Q I think I read from your deposition or perhaps in a newspaper report that you believe that the patrons that see general-run movies are, say, 30 and under as a general rule, and the patrons that see your movies are over that age as a general. Is that a fair statement?

A I think that the—at least what I know about the exhibition of motion pictures, that general audience films today are geared for people from 12 to 28 and the type of patrons that we have for adult films run [29] from their early Twenties up.

Q You just made a statement that you seem to draw from the same clientele through the door. Is it a steady business? In other words, is there really not very much variation in the number of people you draw?

A In some locations that's true, but not in all locations and certainly not in the new additions that we are making.

Q Let's take first the Embassy. Do you draw, for example, at the Embassy a pretty steady crowd of the same people?

A I would say that because the theater is located right in Downtown Seattle, that a lot of people go in there. It does a lot of day business because it is close to the different offices and things around there.

Q Do you know whether or not your attendance figures remain fairly constant for the Embassy?

A They don't vary a lot.

Q Can you tell me some sort of a measure, how many people will you draw a week or a month?

A In a week, probably 1500.

Q Is that the highest number you draw in any of your theaters as an average?

A Yes.

Q Is anybody even close?

A Point Roberts is close.

Q Can you give me a rough estimate on Point Roberts?

[30] A I imagine that's pretty close to the same number. It's hard to tell because where the Embassy Theater is, it is a theater that has a typical male clientele. Other theaters where we have couple rates and we have a different price on couples, I remember the gross figures, but I don't remember the people count. You can throw yourself off a lot that way on the number of people that go through the door.

Q Your prior testimony was of these two theaters, the Embassy and the Point Roberts, were pretty close?

A Yes.

Q Where does the Dishman fall?

A It is just under those.

Q It is maybe the third runner?

A It might have the same number of people, but it won't gross as much because there is more couples and the admission price for a couple is \$9.00, whereas for a single, it is \$6.00. You follow what I'm getting at?

Q I understand. Could you tell me how the Redmond Theater is doing?

A It is doing just fine.

Q I notice some statements that would indicate when it opened, it was doing—to use a term of art—a land-office business. Is my impression of that correct, it did very well when it opened?

[31] A Yes.

Q As many new businesses do, it has backed off a little bit since that point in time?

A Yes.

Q Can you give me a feeling of how many patrons that theater is drawing?

A Right off the top of my head, I can't.

Q Can you compare the gross for the theater with that of the Dishman, the Embassy and the Point Roberts Theater, just where it lays?

A I think it probably does 50% of the Embassy's business.

Q Do you have any theaters that you are operating right now that are losing money?

A Yes, I certainly do.

Q Outside of the Renton and the Roxy, do you have any theaters in your chain that are losing money?

A No.

Q Are there any that are close to the line?

A No.

Q Can you tell me what the worst performer is?

A The Renton and the Roxy.

Q Can you tell me the theaters that you have that are showing adult fare which is the poorest performer?

A Which is the poorest performer?

Q What one brings the fewest dollars to you?

[32] A Well, there is a problem with the way you are framing that in that there are a lot of variables in the business, and variables are things that are based on the amount of film rental you must pay for one location versus another, the amount of rent that is paid, so a theater could do a lot of business and theoretically not make any money because of some of these other factors.

Q Could you analyze from what you have just discussed then, on net, which one is the poorest when you take into account all of the factors you have been discussing?

A Probably my greatest disappointment these days has been in Bremerton.

Q That theater is what?

A The name?

Q Yes.

A The Grand, but that could be because the theater is brand new and we are just getting it established. It seems to be turning about.

Q From your statement, I was left with the impression that despite the fact that it is not doing as well as you expected, the Grand Theater in Bremerton is still making money, is that correct?

A Yes.

Q Have you see any pattern? Is it beginning to make more money as time goes on?

[33] A Yes.

Q Is this an unusual pattern for a new theater, to start out slowly and then gain momentum?

A No.

Q Apparently the theater in Redmond took the opposite approach and made a lot of money up front and then has fallen back to a more normal pattern?

A Well, it depends greatly on the situation, like Redmond, on the film that you are playing. There hasn't been any Raiders of the Lost Ark or Star Wars in our business around lately.

Q I presume from your statement that there are Raiders of the Lost Ark in your business?

A You betcha.

Q Such as?

A Such as—

Q May I suggest one to you. Is Deep Throat a Raiders of the Lost Ark?

A I guess there is some pictures in there that would qualify.

Q You have just handed me something, Mr. Forbes. Do you know what this is?

A I saw some titles on there and they would certainly qualify as pictures of Raiders of the Lost Ark.

Q Such as Behind the Green Door?

[34] A Yes.

Q The Evil Ways of Love, did that make it?

A A good picture.

Q From a profit standpoint?

A Yes.

Q Or for artistic content?

A Probably both.

Q Count the Ways?

A Made by a local Spokane girl.

Q Was it a Raiders of the Lost Ark?

A It sure was in Spokane.

Q Danish Pastry?

A Good picture.

Q Another Raiders of the Lost Ark?

A Not quite, but a very profitable film.

Q Deep Throat?

A Deep Throat was a great picture.

Q Devil in Miss Jones?

A You betcha.

Q Autobiography of a Flea?

A That was a good picture.

Q It seems like we have a lot of Raiders of the Lost Ark. Are there a lot of heavy drawers in this particular area?

A More so every day.

Q Do you think that's because of the films themselves or of [35] the general subject matter that draws people, without relationship to the quality of the film itself?

A I think it has to be the films themselves today.

Q Are the patrons of adult motion pictures becoming more discerning?

A You better believe it.

Q I recall from the time that I was in college—this may be an editorial comment—that it seemed that Deep Throat was a national phenomenon?

A It still is.

Q That it was the first adult motion picture that seemed to draw a general popular response. In other words, it was the thing to go see?

A That's what it became.

Q Has it been the impetus, for these types of movies from your experience to draw the people in?

A Good pictures do more business today than they ever have, drawing a wider audience than they ever have. We also have pictures today that don't mean any-

thing. At one time, this business probably was very stable. It didn't have the ups and downs of general release pictures, but it certainly has the ups and downs today.

Q Mr. Forbes, I want to go back to the damages aspect of this thing again. Your desires, I understand it, would be to compare before and after with the particular theaters [36] in Renton. The Renton Theater is the one that's to show the adult motion pictures?

A I would presume that, yes.

Q When you say the before and after, are you speaking of the growth of the theater or the net profit to Playtime?

A Net profit.

Q Are you speaking of net profit before and after such home office expenses as salaries and your salary as President, and whatever directors' salaries might be paid out?

A Well, I would presume that we would apply the same principles that we have before as we will after.

Q I wasn't involved in those before. I am here and I don't have knowledge and I'm asking you to explain it to me. To the best of your knowledge, is your salary as the President of Playtime debited out of the net profits before you make your damage claim, do you know?

A I don't know.

Q Can you tell me whether or not Playtime as a corporation made a profit in each of the last three years?

A I don't know.

Q Who knows that information? Is that Benson & McLaughlin?

A I would presume, yes.

Q Do you recall as the sole shareholder of Playtime Theaters whether or not you were paid any dividends from that corporation over any of the last three years?

[37] A Dividends out of that corporation, no.

Q Do you know whether Playtime has paid any income tax over each of the last three years?

A I don't know.

Q You don't remember signing a big check to the IRS for Playtime?

A I really don't remember.

Q That would be the kind of thing that would attract your attention, would it not?

A Signing any check attracts my attention.

Q But you don't recall whether or not you paid income tax?

A I don't remember.

Q Would you have recalled that if it was a sizable amount?

A Well, it depends on what you think a sizable amount is. To me, \$5.00 might be.

Q Let's discuss general run theaters for a few minutes. You seem to have a background in general run theaters, and you are now operating two in the City Limits of the City of Renton. I understand from your deposition that you made a statement that the general run theater can be as profitable as an adult theater, is that right?

A It could be.

Q Can you tell me what factors play in that profitability vis-a-vis the difference between general run and adult motion pictures? What are the different things that would [38] allow you to take a location that is not profitable as a general run and make it profitable as an adult theater?

A Well, seeing that I'm not competing with anyone else for product, it certainly makes the product that I show more reasonable to me, the costs of the film itself, the amount that I have to pay for the picture versus if I had a general release theater and there are a number of general release theaters in the Renton marketing area, they all go out there and compete for the same picture. So they could theoretically put out more money to play a picture than they are going to take in at the box office. That isn't true with me.

Q Is not your marketing area affected by the other adult motion picture theaters in the King County area if you were to put Deep Throat in that theater tomorrow?

A No.

Q You think that the drawing area is limited to Renton and its environs primarily?

A The concept that I function under is that the theater in Renton is going to draw people from the Renton area. It is not going to draw people from Downtown Seattle or from Marysville or any other place.

Q You have indicated that there are a number of competing general run theaters. I am aware of the Renton theaters, I don't recall their names, but there are three of them [39] I believe that are located over next to the Sheraton?

A It is forbidding in that area for general release pictures. Here's the way they bid the situation out there. A theater will ask for a clearance over Kent, will ask for clearance over the Sea-Tac Six, the six auditoriums there. There are four at the Lewis & Clark. There is a Southcenter Theater and there are the three down there in Renton Village. There are probably 20 places out there. You got the Valley Drive-Ins. All those theaters bid against one another.

Q Is not the bidding system countywide?

A No, it is bid in a zone.

Q I'm asking you to educate me a little bit because I'm not real knowledgeable. How does somebody get On Golden Pond and make you stand in the rain for two hours to get a ticket? Is it more than zonal? Do they take the entire county?

A It varies with the film company and what their policy is going to be, and the way they want their film distributed, but theoretically, you could go in and put up so much money and you could get it for the Greater Seattle area.

Q You are telling me that the same system does not apply for adult motion pictures?

A Well, it would if there were as many adult motion picture theaters in the area as there are general release theaters.

[40] Q Is there a situation such as On Golden Pond where somebody in the locale takes the entire King County area with an adult motion picture? Does that exist?

A No currently today.

Q Has it previously?

A Not yet.

Q I'm just thinking of an instance like Deep Throat. At that time were there a number of theaters or was it just pretty much limited to the Embassy?

A It was played at the Garden. There were other theaters. In fact, before it played at the Garden, it had two runs previously in Seattle and didn't gross a dime.

Q When you went into the Renton and Roxy Theaters, you anticipated, if I understand correctly, that you were going to operate the Roxy Theater as a general run theater?

A Right.

Q Can you tell me how the films were selected for that theater? Did you go into the bidding process that you previously discussed?

A No. I have a verbal agreement with Sterling Theaters for them to book films for me for that theater or both of the theaters at the moment.

Q Can you tell me what type of guidelines you gave them? Is there a dollar maximum per film or a percentage of gross?

[41] A No.

Q Can you tell me why, for example, Raiders of the Lost Ark is not showing?

A It played there at the Roxy.

Q And something such as On Golden Pond?

A Well, I'm not going to put up the kind of guarantees because I don't have the financial resources to do it

the way some of these people do. I would like to be in business for another year or two also.

Q I presume from your statement you have given these people some sort of guidelines of what they are not supposed to do?

A Yes. I don't want to bid for any film in that area.

Q Is it a correct statement that you are then showing second-run films?

A True.

Q Can you explain to me the market for second-run films versus first-run? Is there a percentage you draw, one-third the audience for a second run?

A Not necessarily. That's not true at all.

Q There's no such measure on the market?

A Not to my knowledge.

Q Did you anticipate doing strictly second-run films in the Roxy when you purchased the theater?

A Yes, I did.

[42] Q Did you expect the Roxy to be profitable?

A I expected it to at least break even.

Q Can you tell me what you anticipated that you were going to do that would be different from what Mr. McCray had done previously, to make it at least a break-even proposition?

A Well, I had anticipated having the lowest admission price in the area and trying to put together programs that had the widest appeal, and looking at the current economic situation in this area, I figured that a budget theater would be very good. They have been in other areas. That was something that he wasn't doing.

Q His fares then were higher than yours?

A Yes.

Q I understand yours are ninety-nine cents and a dollar ninety-nine cents, children versus adults?

A Yes.

Q Can you tell me how much higher his was.

A He was charging \$4.00 for adults, and I don't know what he charged for children.

Q Are most of your fares for children?

A Now?

Q Yes. Are most of the fares being paid at the window for children?

A No.

[43] Q If I understand from a very, very brief review of the material that you have submitted to us, both theaters are presently losing money?

A Yes.

Q There was no profit and loss statement for the month of January but I saw one for the month of February.

A We didn't take over the theaters until January 29th.

Q In February it showed—these are rough—A \$7700 loss for the Renton and a \$6500 loss for the Roxy. Have those figures improved?

A I doubt it. Are you asking if they are getting larger? I think they probably are.

Q The losses are getting larger?

A Yes.

Q Has the number of people paying admissions, fallen?

A Well, it varies from picture to picture. I hope that we have a very good weekend coming up this weekend because they have Robin Hood in one theater and Victor Victoria in the other.

Q Do you know the approximate figures for the months of March and April?

A I don't.

MR. SMITH: We have those here.

Q I notice these are done in handwritten form. Are these done by someone in your office for your benefit or was [44] this done by your accountant?

A I haven't seen them to tell you the truth. What are the numbers you had?

Q For February?

A Yes.

Q I'm subtracting the revenue from your costs and expenses to come up with a net loss.

A I see that, but how big was yours for February?

Q Well, there is \$7700 approximately on one and \$6500 on the other, so I come up with 14,2.

A I see there are some figures missing off of here.

Q Mr. Forbes, so that you understand, you have made a statement in your prior deposition that you felt the loss amounted to \$5,000 a week, and the figures that I have been shown for February would indicate that that figure is closer to \$3,000 to \$3,500.

A I think that I said it was three to five thousand a week.

Q I can read your deposition and answer back, but I want to know your present recollection or what your present feeling is. Is your present feeling that it is somewhere between three and five thousand dollars?

A I would guess that, yes.

Q You were discussing the February figures with me, and you said there were some figures missing off of that. In your prior deposition, you indicated you would take costs and [45] revenue and you would subtract the figures to come out with a loss or profit. Are there some figures that are not included in this?

A I see that there are two columns that are blank. I know that we have to have insurance, but the figures aren't there.

Q Can you tell me if you have any figures for March?

A I see there are some here, yes.

Q Can you show me what you are looking at?

A (Witness complies.)

Q There is apparently a recap sheet for March of 1982 and the bottom line of this thing shows profit and loss and it would appear that the loss for the Renton was \$3,306, and the Roxy was \$5,542 for a total of just about \$8,850, which is substantially less than what was shown in February. Can you explain the difference to me?

A Can I explain the difference to you?

Q Yes.

A Let me take a look at it and see what it says.

Q I think it's obvious that you did better on your revenue.

A Yes. That's what it is.

Q Do you have any idea what the figures are going to be for April?

A April, I think, will look like February.

Q Have you had any preliminary figures to tell you how May [46] is doing with hopefully this good weekend you may have?

A I would guess that May is going to look like March, so there is two like February and two like March.

Q Have you seen preliminary statements for April or May at this point?

A No. I haven't even seen these before.

Q I'll ask you the question again, because I'm not sure that I got the answer or I don't remember it, are these done by Benson & McLaughlin or somebody in your organization?

A Those are done in-house.

Q Who would be the person in-house that would do these?

A Patti Jones.

(Short recess.)

Q Mr. Forbes, you just handed me a document that is your internal recap sheet for April, 1982, that your counsel has handed you and it is in the material that's to be given to us today to review. It indicates that the Renton Theater lost \$5,288 and the Roxy \$1,688 for the month of April. Those are the figures you see at the bottom?

A Is there a one in there? I think that's only \$688. I don't think there's a one in there.

Q So the total is less than \$6,000?

A It looks to me like about six.

[47] Q You believe that the month of May will be what?

A Not as good.

Q Except maybe for this dynamite weekend?

A That would be nice.

Q Let me inquire just a little bit into what was gone into during your prior deposition. In your prior deposition, you seemed to indicate—this is my reading of your deposition, so correct me if I'm wrong, but how you were arriving at the damages that you are going to claim on the Renton Theater was by comparing it to the theater in Dishman. Is that an incorrect assumption on my part or has your position changed since then?

A Well, I think the more fair thing for you is to compare its prior performance with its performance afterwards.

Q Let's go into what you believe the performance is going to be like afterwards. You have used the Dishman Theater as an example that you think is the closest in comparability with the Renton Theater. Can you tell me what type of net profit is made by the Dishman Theater?

A I can't tell you right off the top of my head. I could probably make a guess.

Q Is that an educated guess or just a wild guess?

A It's just a wild guess. I was surprised looking at these numbers. I thought I was doing worse than what they showed me.

[48] Q Do you know the net profit for any of your theaters individually?

A No.

Q Is there some sort of a corporate calculation of those theaters on a month-by-month basis?

A There probably might be someplace. I don't know.

Q Is the same lady, Patti Jones, the one that would have them?

A Yes.

Q I was left with the feeling that the Spokane Theater grossed five or six thousand dollars a month?

A A month?

Q Excuse me, a week.

A That would be closer to it.

Q Can you tell me what the expenses are? Is it half of that?

A The rent is \$4500 a month.

Q Are the rest of the operating expenses equal to that, for example?

A Well, I can't tell you. I don't have the figures here with me. Whatever I told you would be just a wild guess.

Q Mr. Forbes, in reviewing the information that was provided to us, I came across a title report on the subject property in Renton. Did you review that title report?

A I probably looked at it.

Q There was a statement in the title report that there was a [49] restrictive covenant with respect to the showing of obscene materials. Did you know that covenant existed when you bought the theater?

A I don't show obscene motion pictures.

Q I'm not asking you that. I'm asking you if you knew that it existed?

A I knew that it existed.

Q Was that discussed?

A I didn't think that was necessary to discuss it. It doesn't apply to me.

Q Let's talk just for a very brief moment on the market analysis. As I understand it, you did an informational market analysis for the Renton area, is that right?

A I made some observations through the years that I have been in the exhibition of motion pictures in the Greater Seattle area, about the Renton area, yes.

Q Could you tell us what type of observations that you made?

A Well, let me tell you how I arrived at the plan of where I'd put my theaters, where I want them situ-

ated. I spent a number of years working for Sterling Theaters. At the time I was there, they had three major theaters in three geographic areas of Seattle, the John Danz on the East Side, the Northgate in the North End of Seattle, and the Lewis & Clark in the South End. I said, gee, that works [50] real well for them, so if I were to adopt the same plan, it should work well for me because I have a particular audience that I appeal to, these areas are large enough to support one of these theaters and that's how we approached it.

Q You felt there was not adequate showing of adult motion pictures in the South End?

A I thought there was a vast untapped market there.

Q Does Des Moines play in your theory at all?

A No.

Q Why is that?

A Because I think that Des Moines is too hard for people to get to. My primary focus has always been Renton itself as being the area that you can draw everything into.

Q So if I understand, you believe that the ease of access to the theater is an appreciable item that you would consider in locating a theater?

A Yes.

Q Having a lot of experience with driving in Renton, do you believe that the Renton and Roxy Theaters are easily accessible?

A They have been for 40 years.

Q Do you believe that the access to those theaters in Renton are better than the one in Des Moines?

A Yes.

[51] Q Using your analysis, is there not also a vast untapped market in the North End of Seattle?

A Sure.

Q If I understand it, for a short period of time you operated the North End Theater now known as the Greenwood?

A It's not far enough north. The proper area to be in the North End would be someplace around Lynnwood.

Q Was your market analysis done with the assistance of any other person outside of yourself and done outside of your own personal knowledge?

A No.

Q Just strictly your experience in the adult motion picture and general theater business that led to that analysis?

A Yes.

CROSS EXAMINATION

BY MR. BURNS:

Q Mr. Forbes, in identifying a number of motion pictures, Behind the Green Door, The Evil Ways of Love, Count the Ways, Danish Pastry, Deep Throat and the Private Life of Pamela Mann, were you referring to a packet of documents that had been handed to you?

A Yes.

Q Would you like those included as an exhibit to your deposition?

A Certainly.

[52] (Documents marked as Plaintiff's Exhibit 1.)

MR. BURNS: That's all I have.

MR. WARREN: For the record then, I would also like to have marked as exhibits the recap sheets for March and April.

(Documents marked as Defendant's Exhibits 1 and 2.)

(Noon Recess.)

MR. WARREN: For the record, I would like to continue this deposition to another time upon notice for the following reasons:

First is we had discussed today the scope of our Subpoena Duces Tecum and we seemed to disagree as to the scope of it. That questions need to be resolved. We believe that the second part of our Subpoena that references all books, documents or things which might be introduced or used by plaintiff to establish facts to sup-

port damages, has not been met and we disagree on that point. That will have to be resolved, I presume, by a judge.

Secondly, if there is a doubt, we would like to couch a new Subpoena and submit it.

Thirdly, we have a number of documents that have been produced this morning, and I have gone through them [53] briefly and simply don't have the time to digest all the information so as to utilize those documents in an effective manner. Finally, Mr. Forbes has indicated some problem with the shortness of time today. If we got into this, it would probably carry over into tomorrow. I wish to avoid that. I think the main reason is the documents we don't have and the lack of time to review them.

MR. SMITH: Mr. Forbes has all the time you need him for and although he went to lunch, he has indicated he is available to come back to us by 1:15 and could continue for the rest of the day, through tomorrow morning. I don't think that should be one of the grounds upon which you seek to continue this. I have no objection to continuing, but I don't think that's a valid objection.

MR. WARREN: Perhaps I misunderstood what Mr. Forbes was saying or what you were saying, Counsel. If that's not a problem, it's not a problem. I would still like to continue the deposition. We have talked off the record about the measure of damages. I was concerned about the various theaters and the various films and felt that we needed profit and loss statements and the analysis of the individual films to prepare an adequate defense. You have indicated on the record a different measure of damages that I have not had a chance to analyze. So that is also a basis for why we wish to continue the [54] deposition. I presume that the explanation you have given us before both on and off the record, that you are going to be trying to measure the loss by the business

done before and after Mr. Forbes is permitted to operate, if any, is your present position.

MR. SMITH: Assuming that one day he can operate, that would be our position presently and future, we are quite sure. As I said before, if that fails, by your objection and the judge rejecting it, then obviously we don't have a theory of damages as to Kukio Bay and Playtime Theaters.

(Plaintiffs' Exhibit 1 attached.)

(Defendant's Exhibits 1 and 2 left with Counsel.)

* * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C82-59M

PLAYTIME THEATERS, INC.,
a Washington corporation, *et al.*,
Plaintiff,

vs.

CITY OF RENTON, *et al.*,
Defendants.

DEPOSITION UPON ORAL EXAMINATION
OF LISA M. PUDDY

BE IT REMEMBERED, that the Deposition Upon Oral Examination of LISA M. PUDDY, appearing as a witness at the instance of the defendants, was taken at 100 South Second Street, Renton, Washington, beginning at the hour of 1:30 o'clock p.m., on June 16, 1982, before Robert C. Webber, Notary Public in and for the State of Washington;

APPEARANCES:

JACK R. BURNS, Attorney at Law, appearing for and on behalf of the plaintiffs;

MARK BARBER, Attorney at Law, appearing for and on behalf of the defendants;

WHEREUPON, the following proceedings were had and testimony taken, to-wit:

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EXHIBIT INDEX
Chart of Theatres
Owned by Playtime
Theaters, Inc.

* * * * *

[2] LISA M. PUDDY,

being first duly sworn by the Notary, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BARBER:

Q Would you state your full name for the record, please?

A Lisa Michelle Puddy.

Q Lisa, have you ever had your deposition taken before?

A No, I have not.

* * * * *

[4] MR. BARBER: * * * [5] With respect to the Subpoena Duces Tecum and Notice of Deposition that was directed to Playtime Theaters requesting that you designate a party to testify to certain matters, under Federal Rules of Civil Procedure which I believe is 30(b)(6), are you designating Lisa Puddy to testify with regard to those matters?

MR. BURNS: Yes. Ms. Puddy was subpoenaed and the corporation was directed to designate somebody to testify regarding the placement of advertising in newspapers and other communications media regarding films, and the corporation has designated Ms. Puddy as that person. So we are only producing one person at this time, but it is in conformity with all requests that we are aware of.

Q Would you state your present residence address?

A 3600, 14th Avenue West.

Q That's in Seattle?

A Yes, it is.

Q My understanding is you are employed by Playtime Theaters, Inc.?

A I am.

Q How long have you been employed by Playtime Theaters, Inc.?

[6] A It's been six months.

Q When would you have started your employment with Playtime Theaters, do you recall?

A Actually I qualified for insurance in May and it's six months, so count backwards.

Q November of 1981?

A Yes.

MR. BURNS: If you are not certain about an answer, can you give your best approximation.

THE WITNESS: Patti would know for sure, but it was November, '81.

Q Lisa, by whom were you hired to work for Playtime Theaters?

A Roger Forbes.

Q What was your position in November of 1981 when you were first hired by Mr. Forbes for Playtime Theaters?

A What position was I hired as?

Q Yes.

A Advertising Manager.

Q Have you continuously held that position until today?

A Yes.

Q Could you tell me what it is that you do as Advertising Manager for Playtime Theaters?

A My primary job is to place the ads in the newspapers. I handle the bookings and make sure that everybody in the [7] office knows what they are, for shipping and receiving of posters, accessories, one sheet, trailers, and making sure that the theaters get those.

Q Anything else?

A A lot of little other things, the layout and the design of the ads, handling the budget.

Q As Advertising Manager, do you have any persons working beneath you that assist you in performing these duties?

A As of three months ago, another person was hired who is actually laying out the ads.

Q Who is that?

A John Flodin.

Q John has been there since about March of this year?

A Yes.

Q His work is in doing the layouts for the ads?

A Yes.

Q Let me see if you can define some terms for me. You talked about layouts and designs of the ads. Specifically what would that include?

A I take the budget that is given to me by Roger and look at the column sizes of the newspaper and the rates of the newspaper which vary from paper to paper and determine what the best way is to take the elements of the ads, the title and the copy, and put it into mechanical production for the newspapers to reproduce it.

[8] Q Would it be correct to say that you as Advertising Manager then are responsible for how the ad is designed and what its contents are?

A I try to be.

Q Who would be your immediate superior?

A Roger.

Q Mr. Forbes?

A Yes, Mr. Forbes.

Q Do you have to refer any decisions regarding the layout or design of ads to Mr. Forbes before you have them published in the newspaper?

A Sometimes, yes.

Q Could you give me an example when that might occur?

A We will get press material from the distributor which I will show to him and he will use that to determine the budget. So he will often look at the layout after it's done and decide if he wants a larger ad for Friday. He previews the ads before they go to the paper, the layout.

Q Do you know if he previews all of the ads before they go to the newspapers?

A Not always. If he's out of town or not in the office, but he does see them, the layouts, before they go.

Q Would anyone else employed by Playtime Theaters review the ads beyond you before they went to the papers?

A No.

[9] Q With respect to Playtime Theaters, I am aware that they have several theaters throughout the State as well as one in Portland, Oregon, but keeping in mind the theaters in Washington State that they operate and/or own, are there any which do not have ads run for the films that are shown at any specific theater?

A Daily advertising in newspapers, you mean?

Q Yes.

A Walnut Park.

MR. BURNS: That's not in the State of Washington.

THE WITNESS: I'm sorry. The Liberty Theater in Pasco we do not advertise for.

Q Is there any particular reason why Playtime Theaters has chosen not to advertise for the Liberty Theater in Pasco?

A I'm not aware of any reason.

Q With respect to the ads for the other theaters, other than say Pasco and excluding Walnut Park in Oregon, are those ads run on a daily basis in the other newspapers in which you advertise?

A That's more than a yes-or-no answer. Yes, we do place daily advertising, but some papers do not publish on Saturday or we cannot run ads on Sunday because the rates are double, but for the most part we do place daily advertising.

[10] Q Could you tell me what newspapers you do place ads in on behalf of Playtime Theaters?

A Certainly. In Seattle, it's the Seattle Post-Intelligencer and the Seattle Times; the Vancouver Sun in Canada for the Point Roberts Theater; the Spokesman Review and Chronicle in Spokane; and the Bremerton Sun and the Tacoma News Tribune. Now we also for

our Renton and Roxy Theaters, have show times published that is not daily advertising.

Q With respect to the Bremerton Sun, that would be for the Grand Theater?

A Yes, it would.

Q And the Tacoma News Tribune would be for the Rex?

A And the Community.

Q Spokane would be for the Dishman?

A Yes.

Q For Seattle it would be the Embassy?

A Yes.

Q And the Palace?

A Yes, and the Cinemond, and the Renton and the Roxy.

Q At various times do you use the same ads for the same film when it is shown in different cities where Playtime Theaters has a theater located?

A Impossible. The column sizes are all different. We have to do a different ad for each one.

[11] Q So if you were showing a certain film at the Dishman in Spokane, a different ad may appear when the film showed in Bremerton at the Grand Theater just because of the requirements of the newspapers between the Spokesman Review and the Bremerton Sun?

A Yes. The budget and the column size have a lot to do with the finished product.

Q With respect to the films that play, do they change at certain times of the week at various theaters?

A They run from Friday to Thursday so the film starts on Friday and they end on Thursday.

Q Did you cease doing all layouts and designs for the ads when John Flodin became employed by Playtime?

A No. I supervise him but I also take part in creating the ads. I provide the input as regards to the copy, the use of the artwork, and the placement of the ads with the newspapers.

Q Would Mr. Flodin have to come to you with the layout and designs that he has done?

A Yes.

Q A couple of other terms I want to get some definitions from you on, but I'm familiar with; you used the term trailers. I'm not sure how you meant that.

A Trailers are usually three to four minutes of film that are used during intermissions, of coming attractions.

[12] Q When you referred to the term bookings, how did you mean that?

A Bookings are the titles of the films that are coming which are provided through a California agent, and I get all that information and then have to assemble the accessory information and where it is being recircuited to. So the booking information is very important, but that's what it is, what is being booked into the theaters.

Q In your position in handling the advertising for Playtime Theaters, have you noticed that films that show in one city at one theater operated or owned by Playtime Theaters may subsequently be shown in another theater owner or operated by Playtime?

A Have I noticed that they go from one theater to another?

Q Yes.

A Yes. There is definitely a pattern that we recircuit the films.

Q Could you explain what that pattern is which leads to the films being recircuited as you say, where it goes from one theater that Playtime owns, to another?

A The pattern does change and it includes a lot of variables that I don't know you need all the details for. The basic pattern is that we usually premier in our Seattle theaters, the Palace and the Cinemond and the Rex Theater in Tacoma, and several weeks later, the films will then be [13] recircuited to our outlying areas, Bremerton and Spokane and Point Roberts. Then at the Embassy and Community, sometimes we get old film that's moved over or comes back, but there is no real

pattern there as far as the recircuiting the film goes.

Q So I understand with respect to the Embassy and the Community Theaters, when you say there is no pattern, with films that turns up in the Embassy and the Community, would they have already played in other Playtime Theaters?

A Yes. They are usually second run.

Q I believe you indicated earlier that the pattern in which films shown by Playtime Theaters, Inc., are changed, does have some variables that you are not acquainted with?

A I'm aware of some of those variables. The availability of the print from the distributor can affect whether a film is recircuited or not, for instance, or it gets lost.

Q Or destroyed or something like that?

A Yes.

Q Are there other variables that may affect the circuiting of a film throughout the Playtime Theaters' chain other than what you have already disclosed?

A Yes. There are other variables, I'm sure, that the distributors and Roger would know more about than I do. The shipping and receiving of the film and the availability of the print are the two main variables that [14] I know the details of.

Q Then if there were other variables that affected how films were circuited through theaters owned or operated by Playtime Theaters, we would either have to ask the distributor or Mr. Forbes?

A Yes.

(Discussion off the record.)

MR. BARBER: Let the record reflect that while we were off the record, I asked Ms. Puddy if she had brought any documents with her pursuant to the Subpoena Duces Tecum, and she has none with her other than, of course, the notice of this deposition and the Subpoena.

MR. BURNS: Counsel, the plaintiff has already indicated the reasons why. Let the record also reflect that.

(Document marked as Defendant's Exhibit 1.)

Q Lisa, I have handed you what has been marked for identification as Defendant's Exhibit No. 1. This exhibit indicates basically several theaters which are owned or operated by Playtime Theaters, the Bremerton Grand, the Tacoma Rex, Tacoma Community, Spokane Dishman, the Palace which is misspelled by the way on this chart, the Seattle Embassy and the Redmond Cinemond Theaters. It runs for a period of time between March 2nd of this [15] year to June 8th of this year. My understanding is that Mr. Flodin, at least for the past three months, has had the responsibility for preparing some of the layouts for the advertisements that have been placed in newspapers that have affected the theaters in these communities. With respect to your memory and what it is that you recall that may have played at these various theaters during the period of time indicated on this chart, could you review this and give me an idea as to what it is that you recollect and do not recall played at the Bremerton Grand, say, between March 2nd of this year and June 8th of this year?

MR. BURNS: I'm going to object. First of all, this is an exhibit which is not a business record of Playtime Theaters, Inc. It was not prepared by Playtime Theaters, Inc. It was not prepared by the witness. It purports to list, I would guess, approximately 200 film titles which purportedly played at certain theaters on certain dates of which this witness may or may not have any present recollection as to whether they did or not. Secondly, all of the theaters involved are theaters not associated with this lawsuit. It involves advertising relating to theaters which we have objected to the Request for Production of Documents with respect to them. Accordingly, it is our judgment that any discovery with [16] respect to these thea-

ters is irrelevant to any issue in this lawsuit. It is not designed to lead to discovery of relevant evidence. I direct the witness not to answer any questions about advertising at any of these theaters.

Q Lisa, you testified that these films are recirculated throughout theaters owned and operated by Playtime Theaters?

A Yes. Currently that's our booking pattern.

Q So if Playtime Theaters has decided to show adult film fare at a theater that it owns or operates in the City of Renton, would film eventually be recirculated into that theater in Renton?

MR. BURNS: Objection. You are asking the witness to speculate. It is outside the expertise of this witness. She is not involved in the buying and booking of films and she has no knowledge from which to answer that question.

Q You may answer.

MR. BURNS: You can go ahead and answer if you know.

A If I know? I actually really don't know how Renton would be booked.

Q Mr. Forbes has never indicated to you how he would intend to book films into the theaters located in Renton, is that correct?

[17] A Oh, there are several different ways they could be booked. I would guess it would be a first-run house, but that's speculation, isn't it?

Q Could you explain to me some of the other ways that films might be booked into theaters in Renton?

MR. BURNS: Objection. Again, this is not this witness's area of expertise. She was not designated to testify with respect to buying and booking. There is no indication that she has any knowledge or information about buying or booking. I object to the form, nature and substance of the question, and its relevance. If you have any information, you can give it to him.

A The other way we book it is as a second-run house.

Q Then it would be treated like the Embassy or the Community Theaters?

A Perhaps.

Q With respect to your present recollection, Lisa, I want you to bear this in mind, that I'm looking at what you recall at this point in time, in looking at the chart and in regard to the Bremerton Grand, based upon your present recollection, what do you recall having placed ads or prepared layouts for the Bremerton Sun films that would be showing at the Bremerton Grand Theater?

MR. BURNS: Object to that question for the reasons already stated and direct the witness not to answer.

[18] Q Lisa, I hand you an ad that appeared in the Bremerton Sun Wednesday, March 3, 1982, and ask with respect to that ad for the Bremerton Grand if you are familiar with that ad and your participating in this layout or approving it?

MR. BURNS: I object to the question for the reasons previously stated and direct the witness not to answer. We objected to production of any records for advertising relating to any theater other than the Renton Theaters and that objection has been filed with the court and until the court directs us that these areas outside the City of Renton have any relevance to this litigation, I direct the witness not to answer.

MR. BARBER: Mr. Burns, are you going to direct the witness not to answer as to films that played at all of the theaters owned or operated by Playtime Theaters in the State of Washington?

MR. BURNS: Except for those theaters within the City of Renton, yes.

MR. BARBER: So any questions that I ask the witness with respect to theaters owned or operated by Playtime Theaters outside the City of Renton which show adult film fare, you will direct her not to answer, is that correct?

MR. BURNS: That's correct.

(Short recess.)

[19] MR. BARBER: Mr. Burns, in view of the position of your client Playtime Theaters, Inc., that you will object and instruct the witness not to answer questions as to those films which play in theaters owned or operated by Playtime Theaters, Inc., other than those two theaters which are located in the City of Renton, I see little use in continuing the deposition at this time. It should be noted for the record that the City of Renton disagrees with the position which you have put forth on behalf of your client. We believe the material is relevant material to this litigation and is subject to discovery.

MR. BURNS: In what way do you think it is relevant?

MR. BARBER: We feel it is relevant in view of the fact that you have indicated that you would be showing adult film fare in your complaint at the two theaters located in the City of Renton and we are attempting to establish what that fare would be.

MR. BURNS: The fare is defined by your ordinance.

MR. BARBER: I'm talking about the film fare that Playtime Theaters, Inc., would intend to show in the City of Renton if it wished to operate an adult film theater in this city. With that in mind, I would rather [20] not adjourn the deposition of this witness at this time because it will depend upon whether or not the City of Renton should decide to bring a Motion to Compel this information at a later time.

MR. BURNS: Why don't we just continue it to a date to be set or to be adjourned upon agreement of the parties?

MR. BARBER: I believe that would be a proper thing to do. With that in mind, we will conclude the matter for today.

(Exhibit 1 attached.)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3805

DC# C-82-59-M
Western Washington
(Seattle)

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Plaintiffs-Appellants,

vs.

CITY OF RENTON, *et al.*,
Defendants-Appellees.

No. 83-3980

DC# C-83-744-C
Western Washington
(Seattle)

THE CITY OF RENTON, *et al.*,
Plaintiffs-Appellants,

vs.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Defendants-Appellees.

[Filed Apr. 30, 1985]

Before: FLETCHER and FARRIS, Circuit Judges, and
JAMESON,* District Judge

ORDER

Playtime's motion for attorneys' fees and disbursements is denied without prejudice as premature. In light of our remand to the district court for further proceeding, Playtime cannot yet be deemed a prevailing party for purposes of 42 U.S.C. § 1988. Should Playtime ultimately prevail, an award of reasonable attorneys' fees for the entire litigation may then be sought.

The City's motion to recall and stay the mandate is denied. Our disposition of Playtime's application for fees and disbursements renders moot the City's alternative request that we remand that question to the district court.

* Hon. William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

[EXHIBIT 6]

THE CITY OF RENTON
Municipal Building 700 Mill Ave. So.
Renton, Wash. 98055
Barbara Y. Shinpoch, Mayor

MEMORANDUM

TO: Council President Tom Trimm
FROM: Mayor Shinpoch

DATE: May 22, 1980

Our Hearing Examiner has made a suggestion I believe has merit which Council may wish to pursue.

In view of the difficulties some cities have had re-doing their zoning or other ordinances (AFTER an adult theater, bookstore, film and/or novelty shop, etc., has obtained a business license) to respond to the public outcry, it might be to our community's benefit to anticipate this type of business and pass legislation, or state a Council policy, which would designate non-acceptable enterprises/localities.

This way Council would not be in a position of reacting but, rather, of careful preparedness. You would, of course, need advice from our attorneys, but I thought it might be worth your consideration.

Barbara

BARBARA Y. SHINPOCH, Mayor

BYS:hh

cc: All Council Members

[This exhibit to the June 23, 1982 hearing before the Honorable Philip K. Sweigert, United States Magistrate, was inadvertently omitted from the initial printing of the Joint Appendix. If properly inserted, this exhibit would have appeared after JA 291.]

11
No. 84-1360

Office-Supreme Court, U.S.
FILED

JUN 28 1985

ALEXANDER L. STEVENS
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE CITY OF RENTON, *et al.*,
v. *Appellants*,
PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR APPELLANTS

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5784

QUESTIONS PRESENTED

Renton, Washington, is a small city (pop. 32,200) located just outside of Seattle. Prior to the entry or attempted entry of any adult motion picture theatre, the City enacted a zoning ordinance, fashioned after those adopted and judicially approved in Seattle and Detroit, which effectively set aside 520 acres of developing commercial area for the operation of such theatres.* The questions are:

1. May a small city, in enacting a zoning ordinance regulating the location of adult theatres prior to the entry of such theatres, rely upon the experience of other, larger cities regarding the theatres' secondary adverse impact upon residents, schools, churches and businesses, or is a city required, under the First Amendment to the Constitution, to await the theatres' entry and consequent deleterious effects before zoning the impacted area?

2. Where a small city effectively sets aside a significant area of the city for the location of adult theatres, is its ordinance in violation of the First Amendment because a portion of the set-aside area either is presently undeveloped, or is presently developed for existing commercial purposes?

3. Where the intent of a city council in regulating the location of adult theatres is not improperly related to the content of adult films or the suppression of First Amendment rights, and instead is related to such values as preserving commercial areas and family-related neighborhoods, is its regulation constitutionally void because some citizens at a public hearing voiced criticism of film content?

* The Questions Presented are set forth verbatim as they appeared in the Jurisdictional Statement. As the Jurisdictional Statement, the Reply Brief and this Brief make clear, the set-aside zone was comprised of about 400 acres prior to the entry of any adult theatre, and an additional 120 acres were effectively added thereafter.

PARTIES TO THE PROCEEDINGS

In addition to the City of Renton, the following are Appellants in this Court: Barbara Y. Shinpoch, Mayor of Renton; Earl Clymer, Robert Hughes, Nancy Mathews, John Reed, Randy Rockhill, Richard Stredicke, and Tom Trimm, members of the Renton City Council; and Alan Wallis, Chief of Police of the City of Renton.

Kukio Bay Properties, Inc.,** and Playtime Theatres, Inc., both Washington corporations, are Appellees before this Court.

** Since the completion of the proceedings below, Kukio Bay Properties, Inc., has changed its name to Sea-First Properties, Inc. To avoid confusion we will continue to refer to Kukio by its original name, which was the one used in the testimony, briefs, and opinions below.

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| <i>Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n</i> , 461 U.S. 190 (1983) | 39 |
| <i>Palmer v. Thompson</i> , 403 U.S. 217 (1971) | 39 |
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| <i>United States v. O'Brien</i> , 391 U.S. 367 (1968) | 14, 15, 17, 20, 36-38 |
| <i>Village of Arlington Heights v. Metropolitan Housing Development Corp.</i> , 429 U.S. 252 (1977) | 39, 41-42 |
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| <i>Young v. American Mini Theatres, Inc.</i> , 427 U.S. 50 (1976) | 3, <i>passim</i> |
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| American Society of Planning Officials, Planning Advisory Service Report No. 327, <i>Regulating Sex Businesses</i> (May 1977) | 29 |
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| Department of City Planning, City of Los Angeles, <i>Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles</i> (City Plan Case No. 26,475, June 1977) | 26 |
| Department of Metropolitan Development, Division of Planning, Indianapolis, Indiana, <i>Adult Entertainment Businesses in Indianapolis: An Analysis</i> (February 1984) | 26 |
| Emerson, <i>First Amendment Doctrine and the Burger Court</i> , 68 Calif. L. Rev. 422 (1980) | 37 |
| MacKinnon, <i>Pornography, Civil Rights and Speech</i> , 20 Harv. C.R.-C.L. L. Rev. 1 (1985) | 26 |
| Marcus, <i>Zoning Obscenity: Or, The Moral Politics Of Porn</i> , 27 Buffalo L. Rev. 1 (1977) | 26, 29 |
| Minutes, Renton City Council, Sept. 24, 1984 | 33 |
| Planning Department, City of Phoenix, <i>Adult Business Study</i> (May 25, 1979) | 26 |

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| F. Strom, <i>Zoning Control of Sex Businesses</i> (1977) | 29 |
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1360

THE CITY OF RENTON, *et al.*,
Appellants,

v.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, from which this appeal is taken, was rendered on November 28, 1984. It appears at 748 F.2d 527 and has been reprinted as Appendix A to the Jurisdictional Statement ("App.") at 1a. The United States District Court for the Western District of Washington rendered several opinions and orders in this case, none of which has been officially reported. Its rulings are reprinted as Appendices B-E and G-H to the Jurisdictional Statement (App. 23a, 33a, 34a, 35a, 46a, 48a).

JURISDICTION

This action was brought by Appellees in the United States District Court for the Western District of Washington seeking, *inter alia*, declaratory and injunctive relief against the enforcement of Renton's zoning ordinance governing the permissible location of adult theatres. Jurisdiction in the District Court was based on 28 U.S.C. §§ 1331, 1343(3) and 2202. The District Court denied the requested relief.

On November 28, 1984, the United States Court of Appeals for the Ninth Circuit reversed the trial court and held Renton's zoning ordinances in violation of the First Amendment to the United States Constitution. Appellants' Notice of Appeal was filed in the Ninth Circuit on February 6, 1985 (App. 55a). Jurisdiction lies in this Court under 28 U.S.C. § 1254(2). *New Orleans v. Dukes*, 427 U.S. 297, 301 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 n.2 (1975). This Court noted probable jurisdiction on April 15, 1985.¹

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

The full text of Renton Ordinances 3526, 3629 and 3637 is set forth in the Appendix to the Jurisdictional Statement at 78a-98a.

¹ Neither court below certified to the Washington Attorney General the fact that the constitutionality of the Renton Ordinance was drawn into question and that 28 U.S.C. § 2403(b) may be applicable. Pursuant to Rule 28.4(c) of this Court, Appellants served three copies of their Jurisdictional Statement upon the Attorney General of the State of Washington.

STATEMENT OF THE CASE

In mid-1980, the City of Renton, Washington, prompted in part by a seminal decision of this Court and by a later one of the Supreme Court of Washington, began to address the problem of "adult uses", even though no such uses had yet been established in the City.²

The seminal decision of this Court was *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), in which it was held that the City of Detroit could use the secondary effects of theatres showing sexually explicit "adult" movies as a basis for placing those theatres into restricted areas in an attempt to preserve the "quality of urban life" and in furtherance of the "city's interest in preserving the character of its neighborhoods" (*id.* at 71; plurality opinion). The zoning ordinances in Detroit (App. 99a, 113a, 118a) required already existing adult theatres (as well as those that would be purchased or built thereafter) to be dispersed—that is, they could not be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area (427 U.S. at 52).

Four years later, the Supreme Court of Washington, sitting *en banc*, unanimously upheld two zoning ordinances (App. 126a, 138a) that required adult theatres to be located in certain downtown areas of Seattle. *Northend Cinema, Inc. v. City of Seattle*, 90 Wash. 2d 709, 585 P.2d 1153 (1978).³ Reciting extensive studies demonstrating the problems created by such theatres in residential and commercial areas, the court held that the ordinances were valid under *Young*. The residents of Seattle had expressed concerns about the attraction of transients, parking and traffic problems, increased crime,

² In fact, there are no other adult uses in Renton even today, other than the adult use that is the subject of this lawsuit. See Joint Appendix ("JA") at 174.

³ Appellee Playtime Theatres, Inc., was one of the unsuccessful litigants in *Northend Cinema*.

decreasing property values, and interference with parental responsibilities toward children. "In short, the goal of the City in amending its zoning code was to preserve the character and quality of residential life in its neighborhoods * * *. A second and related goal * * * was to protect neighborhood children from increased safety hazards, and [the] offensive and dehumanizing influence created by [the] location of adult movie theatres in residential areas" (585 P.2d at 1155).

The effect of the Seattle restrictions was to force adult theatres into an area consisting of approximately 250 acres (or less than 1% of the city's acreage) (*id.* at 1156). Noting that this Court had approved the "concentration" as well as the "dispersal" method of zoning theatres in *Young*, the Washington Supreme Court ruled that Seattle's planning effort "must be accorded a sufficient degree of flexibility for experimentation and innovation" (*id.* at 1159). This Court denied certiorari in the case (441 U.S. 946 (1979)).

Appellant Renton, Washington, is a small city, with a 1981 population of 32,200 (JA 25), whose northern border is approximately one mile from the southern border of Seattle. In fact, Appellees' president considers Renton "the South End of Seattle" (JA 336-337, 348). Renton covers 15.3 square miles, or approximately 9635 acres, of which 2025 are occupied by single-family residences, another 415 by multi-family residences, 385 by commercial uses, and 500 by parks and recreational areas (JA 26). It has only three theatres in the whole city. The residential and business areas are in all instances located in close proximity to one another, and the shopping and commercial areas, including four large shopping clusters, are dispersed throughout the City (JA 26, 42). Multi-family residences adjoin the two downtown theatres that were ultimately purchased by Appellees (JA 261). The Renton School District includes fourteen elementary schools, three middle schools, three high

schools, and a vocational school (JA 26). There are 18 parks and 62 churches in Renton (*id.*).

Despite the *Young* and *Northend Cinema* decisions, other cities in the United States were beginning to have difficulty fashioning zoning ordinances that would adequately deal with the deleterious effects of adult uses and at the same time meet constitutional challenges in the courts.⁴ Therefore, Renton's mayor suggested that the problem be addressed in Renton *before* it developed in that city (JA 411). The City Council agreed, and the matter was referred to the Planning and Development Committee ("PDC") for study (JA 38).

The PDC was writing on a clean slate insofar as Renton was concerned, because more than a year and a half would pass before anyone even attempted to purchase, lease or build an adult use facility in the City (JA 74, 174; App. 60a). But the PDC had the experience of other cities to guide it. After some study, the PDC recommended that the matter of adult uses be referred to the Planning Commission, and the City Council agreed (JA 39-40). A moratorium on licensing adult uses followed, and the entire problem was then referred back to the PDC (JA 41-44). The PDC itself held at least six public meetings, and at several of them testimony was given by members of the public (JA 27-28, 129-130, 198). In addition, the PDC discussed "on numerous occasions" with the Ways and Means Committee the standards to be used in any proposed zoning ordinance (JA 179). The PDC also received a comprehensive report from the City Attorney's Office, members of which constantly advised as to what had occurred in other cities (JA 27, 108-110, 181).

By March 1981, the issue was no longer adult uses in general but adult film theatres in particular. A public

⁴ See Jurisdictional Statement ("Juris. State.") at 11-13.

meeting of the PDC was held on this subject on March 5, 1981, attended by 64 citizens, 28 of whom gave testimony (JA 27, 185-186). Included among the witnesses was the Superintendent of Schools, who stressed the "negative impact upon elementary school children walking to and from school" and children "walking or being in the vicinity of those types of land uses going and coming from school" (JA 32-33, 72, 131-133). The head of the local Chamber of Commerce testified "as to the economic adverse effects of the adult theatre use in the City of Renton" (JA 71). He noted that "adult entertainment land uses * * * could [] adversely affect business practices, property values within the City * * *" (JA 133).

There was testimony of great diversity at these various meetings.⁵ Several speakers, for example, noted the adverse impact caused by adult theatres on "neighborhoods and businesses" (JA 27-28) and on real property values, including a depreciation in such values (JA 28, 76, 77, 192). One citizen spoke about the adverse effect on the business welfare of the community (JA 72). Others spoke about the vitality, economic health, and business welfare of the City, creating a concern about the "protection of residential neighborhoods of the City of Renton from potential adverse effects of adult entertainment" (JA 72-73). There was evidence, for example, that businesses in Milpitas, California, had experienced reduced trade as a result of a nearby adult book store (JA 174). Witnesses also expressed concern about the secondary adverse impact upon children, including their character and moral fiber, as well as the difficulty of properly teach-

⁵ No formal record was made of all of these meetings, but Renton's Policy Development Director, who was present at virtually all of them, testified as to what occurred (JA 70-71, 109, 111, 130-131).

ing children, with people "going and coming from the theatre" (JA 28, 76, 77, 190-191).

A great deal of concern was expressed about crime, including prostitution and assaults (JA 76, 195). There was testimony at one of the PDC meetings that "there would be an increase" in the crimes of assault and prostitution (JA 172-173), and the synopses of the Seattle and Detroit experiences provided to the PDC suggested such increases (JA 76, 173). There was also testimony that people might not want to go to either parks or churches located in the vicinity of adult theatres (JA 191). Overall, there was grave concern about the effect of "this type of activity upon persons or individuals in the general vicinity of those uses" (JA 70).

In the meantime, the PDC had been looking at the experience of other cities. One of the most important of these, of course, was Seattle, just next door. One or two Seattle residents discussed with the PDC the background of events leading to Seattle's ordinances (JA 195-196), speakers noted the deterioration of neighborhoods in Seattle (JA 28), and the PDC reviewed the Seattle ordinances and the "major conclusions but not the detailed background" of the *Northend Cinema* case as well as an opinion letter on it.⁶ The PDC was concerned about the "spinoff effects that would be similar to the Skid Road [Row] impacts" in Seattle (JA 76). More specifically, the concern from the Seattle experience was over the "adverse effects upon the moral character of young people", the "secondary impact of other related * * * potential criminal activity and activities of that type", and the "potential adverse impact on property values in the immediate vicinity of those types of uses" (JA 76).

This Court's findings and decision in *Young* were reviewed (JA 75), as well as a zoning and planning law report relating to that case (JA 167). In addition, the

⁶ JA 74-75, 167-168, 170, 267-268; see also JA 71.

PDC looked at "detailed examples" from Tacoma and other cities (JA 29). In fact, "numerous cities' approaches" were considered (JA 167-168)—a lawsuit in Des Moines, for example, was discussed (JA 169-170).⁷ Several persons from Tacoma testified before the PDC about their concerns when Tacoma's general fare theatre converted to adult fare (JA 195-197). Boston's "combat zone" and the regulatory approach in Marysville, Washington, were discussed (JA 167, 197), and testimony about property values in a case from Milpitas, California, was considered (JA 174). Renton's Policy Development Director was familiar with and discussed the Milpitas situation, having worked on city planning there for seven years (JA 56, 104-105).

After months of study, the PDC recommended to the City Council that the matter of adult theatre uses be referred to the Ways and Means Committee for the drafting of an appropriate ordinance (JA 47). The PDC concluded that the areas of most concern were the "protection and preservation of its [Renton's] residential areas and the accessory land uses such as schools, parks, churches and other public and quasi-public land uses" (JA 29). The City Council agreed (JA 48), and on April 13, 1981—almost a year after the matter was first taken up—the City Council adopted by a vote of 5-to-1 Ordinance No. 3526 (App. 78a). As one *amicus* has pointed out, this ordinance was part of a comprehensive city plan going back 15 years, one purpose of which was to limit commercial exploitation in a way that was not harmful to the community.⁸ All of the normal pro-

⁷ The experience of other cities was clearly relevant. Playtime's president admitted, for example, that Renton is a similar market to Spokane for adult films, playing to "roughly the same kind of market"; "Spokane would be a comparable market to this [Renton] area" (JA 348; see also 372-373).

⁸ Brief *Amicus Curiae* of the National League of Cities, *et al.*, in support of Jurisdictional Statement, at 2-3, incl. n.2.

cedures for committee and City Council meetings had been followed in dealing with adult theatre uses (JA 129-130, 178-179, 185-186).

Ordinance 3526 defined an "adult motion picture theatre" in terms of a building "used for" the exhibition of visual media depicting "Specified Sexual Activities" and "Specified Anatomical Areas" (App. 78a), which were defined in detail.⁹ It prohibited such theatres from locating within 1,000 feet of any residential area, church, park, or religious facility or institution, or within one mile of any school.¹⁰ The ordinance's definition of "adult motion picture theatre" was modeled after, and was virtually identical to, the definitions in the ordinances

⁹ These definitions were as follows:

1. "Adult Motion Picture Theater": An enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as hereafter defined, for observation by patrons therein.

2. "Specified Sexual Activities":

(a) Human genitals in a state of sexual stimulation or arousal;

(b) Acts of human masturbation, sexual intercourse or sodomy;

(c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

3. "Specified Anatomical Areas":

(a) Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and

(b) Human male genitals in a discernible turgid state, even if completely and opaquely covered. [App. 78a-79a.]

¹⁰ One mile was chosen because it was the "minimum student walking distance" (JA 47) and because busing was provided to elementary school students located more than one mile from their schools (JA 28).

that had been approved in *Young and Northend Cinema* (see App. 99a-139a, where the relevant portions of the Detroit and Seattle ordinances are set forth in their entirety).

Roger H. Forbes was the president, sole officer, sole director, and sole stockholder of Appellees Playtime Theatres, Inc., and Kukio Bay Properties, Inc.¹¹ Kukio owned 10 theatres in eight cities and leased all of them to Playtime.¹² They all showed sexually explicit films (JA 307-312). Kukio and Playtime both had their main offices in Seattle, but Playtime's adult film-buying service was Pussycat Theatres, the dominant adult theatre circuit in California.¹³ In January 1982, some nine months after Renton had enacted its ordinance, Forbes began making plans to have Kukio acquire and lease to Playtime two existing theatres in downtown Renton, at least one of which Forbes intended to operate as a theatre showing sexually explicit films.¹⁴ He first inquired as to whether Renton had an adult zoning ordinance and obtained a copy of the ordinance (JA 368). Playtime and Kukio then filed a Complaint in the United States District Court for the Western District of Washington on January 20, 1982, seeking a preliminary injunction against enforcement of the ordinance (JA 1). This was

¹¹ JA 296-297, 303, 304, 316-319, 323, 361-362.

¹² JA 300. All but one of these cities were in the State of Washington: Seattle, Spokane, Tacoma, Bremerton, Pasco, Point Roberts and Redmond. The other was in Portland, Oregon (*id.*). All 10 theatres were profitable (JA 379-380). Playtime recirculated its adult films throughout all of its theatres (JA 403).

¹³ JA 297, 302-303, 304-305, 316, 318, 365.

¹⁴ JA 328-329, 339; see also JA 306; App. 60a-61a. Among the films Forbes intended to show in Renton were "Deep Throat" and "The Devil in Miss Jones" (JA 349, 367), and these were, in fact, the first two films shown in the City when Playtime commenced exhibiting adult film fare.

followed by a motion for a temporary restraining order ("TRO"), which was referred to a Magistrate (JA 2).

Four days later, on January 26, 1982, Kukio purchased the two theatres, and the next day it leased them to Playtime (App. 60a). Within a few days, affidavits were filed by both sides in support of their respective positions (JA 3, 25, 32, 34), and Renton's Policy Development Director testified before the Magistrate on the application for the TRO (JA 53).¹⁵ The Magistrate recommended against the entry of a TRO (App. 49a), and Kukio and Playtime then filed an Amended Complaint (App. 57a)¹⁶ alleging that Renton's ordinance was unconstitutional on its face and as applied to plaintiffs under, among other things, the First and Fourteenth Amendments, and that it was not susceptible of a constitutional construction (App. 68a-69a). They sought, *inter alia*, a declaratory judgment and a preliminary and permanent injunction (App. 75a-76a). Kukio and Playtime (hereinafter collectively "Playtime") conceded that at least one of their theatres would "continuously operate exhibiting adult motion film fare to an adult public audience * * *." ¹⁷

The District Court adopted the Magistrate's recommendation and denied Playtime's motion for a TRO

¹⁵ As explained in n.53 *infra*, the short time period between the filing of the Complaint and the TRO hearing resulted in several maps being filed which were simply in error in setting forth the effect of the ordinance.

¹⁶ There were during this succeeding period several attempts by Renton to have the District Court abstain in favor of a state court, but both courts below held that federal jurisdiction was appropriate (App. 4a, 9a-12a). Even though we believe the courts below were in error in regard to abstention (*cf. Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982)), that issue is not pursued in this appeal.

¹⁷ App. 61a. Playtime's Complaint described these films as "erotic materials which are not otherwise obscene" (App. 62a; see also App. 63a, 77a).

(App. 46a, 48a). Two days later, on February 25, 1982, the Renton City Council held a public hearing on the subject of adult theatres, at which it heard testimony from a number of interested citizens (App. 85a). Discovery in the underlying lawsuit proceeded (JA 100, 161, 294), and on May 3, 1982, the City Council passed a second zoning ordinance (No. 3629), amending the prior one. Insofar as relevant here, the amendment (a) spelled out the fact that in passing the prior ordinance, the City Council had relied upon the decisions in *Young and Northend Cinema* (App. 81a); (b) summarized the testimony received at the prior PDC public meeting of March 5, 1981 (App. 81a-85a); (c) set forth findings of fact that had formed the basis of the prior ordinance (*id.*); (d) summarized and adopted the testimony received at its own public hearing on February 25, 1982 (App. 85a-86a); (e) defined "used" in the prior ordinance to mean "a continuing course of conduct" (App. 87a);¹⁸ and (f) reduced the restriction on locating adult theatres near schools from one mile to 1,000 feet (App. 87a).¹⁹

The City Council's findings, which are set forth in full at App. 81a-86a, emphasized that the location of adult theatres in close proximity to residential areas, churches, parks, and schools might lead to increased criminal activities, including prostitution, in such areas; that the location of adult theatres would have a deteriorating effect on the areas of the city in which they were located; and that reasonable regulation of adult

¹⁸ The term "used" was defined as a continuing course of conduct of exhibiting "specific [*sic*; specified?] sexual activities" and "specified anatomical areas" in a manner which appeals to a prurient interest. [App. 87a.]

¹⁹ The amendment also declared a state of emergency to exist and included a severability clause and a declaration that a violation of the ordinance was a public nuisance, which was subject to abatement by civil action (App. 88a-89a).

theatre locations would protect the character of the community and its property values while providing access to those who wished to patronize adult theatres.²⁰ Finally, on June 14, 1982, the City Council, on advice of counsel, adopted a third ordinance (No. 3637) which re-enacted Ordinance 3629 without an emergency clause (App. 90a). These three ordinances will hereinafter be referred to collectively as "the ordinance."

By drawing a series of circles around the areas restricted by the original ordinance, one could determine that its effect was to set aside approximately 400 acres, or about 4.1% of the City, within which adult theatres could locate.²¹ However, when the second ordinance was adopted, reducing the proscribed distance from schools to 1,000 feet, the set-aside zone was effectively enlarged to 520 acres, or 5.4% of the City (JA 213). This enlarged area, which was highly accessible to Renton residents (JA 257-260), contained "primarily developed, existing commercial development of various types" as well as "areas that are currently undeveloped and in the process of transition to developed uses" (JA 262). The set-aside zone included land "in all stages of development from raw land to developed, improved and occupied office space, warehouse space and industrial space" (JA 213).

After a hearing, the Magistrate submitted a report recommending that Renton's ordinance be held in violation of the First Amendment (App. 37a). The District Court first granted a preliminary injunction and denied Renton's motion for summary judgment (App. 35a). Then, for the first time, Playtime began showing sexually explicit films at one of its two downtown theatres. However, after the parties agreed to submit the case on its

²⁰ City authorities had recognized during their deliberations that these types of theatres could not be banned from Renton (JA 27).

²¹ JA 30, 57, 126, 199.

present record (App. 8a), the District Court denied a permanent injunction and granted summary judgment in favor of Renton (App. 23a, 33a).

The court ruled that Renton's ordinance "in its essential features is virtually identical" to the Detroit and Seattle ordinances, except that the word "used" was more precisely defined in the Renton ordinance (App. 26a-27a). The intrusion into First Amendment interests was not substantial because the ordinance's restrictions were even narrower than those in the Detroit and Seattle ordinances. No theatre had been closed, there was no content limitation, and the availability of 520 acres contradicted the notion of a substantial restriction on protected speech. According to the District Court, the burden of having to locate a theatre within the set-aside area was no different than the burden upon other land users "who must work with what land is available to them in the city" (App. 27a). The trial court ruled that the acreage available to Playtime and other adult theatres was comprised of land "in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads * * *" (App. 28a).

Furthermore, the District Court found that Renton's ordinance met all four parts of the test in *United States v. O'Brien*, 391 U.S. 367, 377 (1968).²² In particular, Renton's articulated interests in protection of its community through zoning were furthered by its ordinance.

²² Under this test, a governmental regulation must meet the following criteria to survive a First Amendment challenge: (1) the regulation must be within the constitutional power of the Government; (2) the regulation must further an important or substantial governmental interest; (3) the asserted governmental interest must be unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of the governmental interest.

There was no evidence that the secondary effects of adult land uses in Renton would be different than those in Seattle, Tacoma, or Detroit, and the experience of other cities and towns "must constitute some evidence" for the City Council to consider; the "observed effects in nearby cities provides [*sic*] persuasive circumstantial evidence of the undesirable secondary effects" Renton was attempting to obviate (App. 30a). Renton, according to the District Court, was entitled to experiment in this admittedly delicate and serious area (App. 31a). While some citizens at public meetings predictably expressed concerns that could have formed an impermissible basis for the ordinance, these statements "should not negate the legitimate, predominate concerns of the City Council * * *" (*id.*). Thus, because Renton's "effort to preserve the quality of its urban life * * * is minimally intrusive of a particular category of [the] protected expression" described in *Young* (App. 32a), the District Court granted Renton's motion for summary judgment.

The Ninth Circuit reversed and held Renton's ordinance in violation of the First Amendment (App. 22a). It refused to review the District Court's *O'Brien* rulings under a clearly erroneous test but instead considered them as mixed questions of law and fact, subject to *de novo* review (App. 15a-16a).²³ The Ninth Circuit ruled:

1. Renton improperly relied on the experience of other cities in trying to prove a significant governmental interest to support its enactment. The Court of Appeals distinguished Renton's ordinance from that in *Young* because Detroit's ordinance *dispersed* adult theatres, whereas Renton's *concentrated* them in one area (App. 17a). Furthermore, Renton had to "justify its ordinance in the context of *Renton's* problems—not Seattle's or Detroit's problems" (*id.*; emphasis in original). "Renton

²³ However, the Ninth Circuit recognized that the "clearly erroneous" standard applied to other findings (*id.*).

has not studied the effects of adult theaters and applied any such findings to the particular problems or needs of Renton" (App. 19a). Detroit's studies "are simply not relevant to the concerns of the Renton ordinance * * *" (*id.*).

2. Without disagreeing that 520 acres in all stages of development were outside the areas restricted by the ordinance, the court concluded that this acreage was not "available" in the constitutional sense because "a substantial part" was undeveloped or already occupied by various industrial and commercial concerns (App. 13a).

3. There was "at least an inference that a motivating factor behind the ordinance was the suppression of the content" of speech. The test was not the "predominate" concern of the City Council; where mixed motives are apparent, the test is whether "a motivating factor in the zoning decision was to restrict" First Amendment rights.²⁴

This Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

Under both the plurality and concurring opinions in *Young*, Renton's zoning ordinance is valid. In particular, the City has a strong governmental interest in seeking to limit the anticipated secondary adverse effects of adult theatre uses, and its ordinance furthers that interest. As simply a regulation of the *place* where adult theatres may locate, the ordinance is, at most, an incidental restriction upon access to protected expression.

Renton had to rely in part upon the experiences of other cities with the adverse secondary effects of adult theatres, because Renton was acting well before the entry of any such theatres into the City. The Ninth Circuit ruling would prohibit zoning in advance of anticipated adverse effects and would require small cities

²⁴ App. 20a (quoting *Tovar v. Billmeyer*, 721 F.2d 1260, 1266 (9th Cir. 1983) (emphasis deleted), *cert. denied*, 105 S. Ct. 223 (1984)).

and towns needlessly to replicate evidence at considerable expense that had already been established elsewhere. Moreover, Renton relied upon substantial evidence in addition to the experiences of other cities.

Renton's zoning ordinances will have only a minimal impact on First Amendment interests. The land effectively set aside for adult theatres consists of 520 acres, or more than 5% of the entire land area of the City. It is large enough to accommodate over 400 theatres and surrounding parking lots, and consists of land which, as the District Court found, is "in all stages of development from raw land to developed, industrial, warehouses, office, and shopping space that is criss-crossed by freeways, highways, and roads * * *." The Ninth Circuit's conclusion that this land is not constitutionally "available" rests in part on a misreading of the record and in part on the mistaken premise that a city, before zoning, must insure that there be someone immediately available to sell to an adult theatre operator—in effect, a "turnkey" operation. The test of "availability", in the constitutional sense, should be whether the set-aside zone is accessible, and whether prospective theatre operators can build or buy a theatre in the ordinary course of business.

Finally, the Ninth Circuit incorrectly held that the City had failed to prove the absence of an improper motive behind its ordinance. Where, as here, there is a strong and legitimate governmental interest and a minimal impact on First Amendment rights, no inquiry into legislative motive is called for. That is the teaching of both *Young* and *O'Brien*, where this Court refused to undertake the "hazardous" task of determining legislative motive. Moreover, such an inquiry, even if proper, should not be whether any possible illicit motive could have been present but whether there were legitimate motives underlying the legislation. Regardless of the test, the motives behind Renton's ordinance were proper. Virtually every one of them related directly to land uses rather than the content of films. Renton was dealing with such

traditional zoning concerns as a decline in property values and the prevalence of crime. If a city cannot also zone on the basis of the dehumanizing effects of adult land uses on children and the family, property values will be improperly elevated over human ones.

ARGUMENT

I. RENTON'S ORDINANCE IS VALID UNDER *YOUNG*.

Cities and towns may regulate the location of adult theatres so long as speech is not substantially inhibited. That was the holding of *Young*, even though a majority of the Court could not agree on a common rationale.

Justice Stevens' plurality opinion recognized at the outset that Detroit's distinction between adult and general fare theatres was content based in the sense that the "adult" classification was expressly predicated on the character of the films exhibited (427 U.S. at 53; see also *id.* at 63). The plurality, joined by Justice Powell, first held that Detroit's zoning ordinances were not void for vagueness (*id.* at 58-61, 73)—a question not in issue here.²⁵ During the course of its discussion of this issue, however, the Court made two observations that are pertinent here. It said it was not persuaded that the ordinances "will have a significant deterrent effect on the exhibition of films protected by the First Amendment" (*id.* at 60), and there is "a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance * * *" (*id.* at 61). The plurality, again joined by Justice Powell, then held that Detroit's ordinances did not constitute an impermissible prior restraint

²⁵ The void-for-vagueness argument was based on the grounds that the theatre owner could not determine how much adult entertainment need be shown before the ordinance came into play, and the waiver procedures in the ordinance were not sufficiently specific. Renton's ordinance spells out the requisite "use" necessary to make the restrictions operative, and it has no waiver provisions.

merely because adult theatres were subject to zoning and licensing requirements (*id.* at 62-63, 73). The ordinances placed no limits on the total number of adult theatres that could operate, distributors and exhibitors were not denied access to any market, and the viewing public was able to satisfy its appetite for sexually explicit fare (*id.* at 62-63).

The plurality then turned to the Equal Protection Clause and parted company with Justice Powell. Justice Stevens pointed to numerous instances (including commercial speech) where the content of speech had divided permissible and impermissible conduct, even though government must nevertheless be neutral in its attitude toward the speech itself (*id.* at 66-70). Adult theatres may be regulated because the theatres' location is unaffected by the films' particular message (*id.* at 70). Moreover, even though erotic materials cannot be totally suppressed, society's interest in protecting them "is of a wholly different, and lesser, magnitude" than its interest in protecting political debate (*id.*).²⁶ The state could therefore use "content" as a basis for placing adult theatres in a different classification from general fare theatres (*id.* at 70-71). The ordinances created nothing more than a limitation on the *place* where adult films could be shown, and the limitation was based on the secondary effects of concentration rather than the dissemination of ideas themselves. The effect was not to suppress, or "greatly" restrict access to, lawful speech, and therefore such limitations were constitutional (*id.* at 71-72 & nn. 34-35).

Justice Powell, concurring, reached the same result by a slightly different route. He viewed the case as simply one of innovative land-use regulation, "implicating First

²⁶ "[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice" (*id.*).

Amendment concerns only incidentally and to a limited extent" (*id.* at 73). The fact that the ordinances created economic loss to the theatres was not important; the theatres were "affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation" (*id.* at 78). The First Amendment inquiry related to the *effect* of the regulation, and clearly Detroit had imposed no content limitation on the film creators, had not limited their ability to make the films available, and had not restricted "in any significant way" the viewing of those films. The impact of the ordinances was therefore "incidental and minimal" (*id.*).²⁷ The number of adult theatres in Detroit would presumably remain the same, even though some patrons would be inconvenienced.

Under these circumstances, Justice Powell analyzed the ordinances under the four-part *O'Brien* test (*see* n.22, *supra*). There was no question but that the ordinances were within Detroit's power to enact and that the interests furthered were important and substantial,²⁸ particularly since zoning is perhaps the most essential function performed by local government (*id.* at 80). The third and fourth parts of the test were also met, because Detroit had not embarked on an effort to suppress free expression,²⁹ nor did it impose more than the minimum encroachment necessary to further its purpose (*id.* at 80-82).

²⁷ *See also id.* at 81 n.4: "[A] zoning ordinance that merely specifies where a theatre may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression."

²⁸ "Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values" (*id.* at 80).

²⁹ Justice Powell pointed out, for example, that Detroit did not try to close any theatres or restrict their number (*id.* at 82 n.4).

We submit that *Young's* holding is fully applicable to the facts of the instant case. Renton did not try to close any existing adult theatres or to prevent the entry of such theatres into the city. It did not attempt to restrain the number of theatres that could open or operate. It did not inhibit the creation of adult films or their distribution. It did not regulate in any way the types or numbers of adult films that could be shown. It did not restrict the hours of play or inhibit advertising. It did not distinguish among adult theatres or among adult films. It did not even require a separation among adult uses, nor did it activate special licensing or waiver provisions.

All it did was to provide, in effect, that adult theatres had to be *located* within a certain area. As we show in part III, this area was so commodious and so accessible that any impact on viewing was, at most, "incidental and minimal"; patrons, at most, were "inconvenienced".³⁰ Far from being "a pretext for suppressing expression",³¹ Renton's ordinance was a thoughtful, legitimate response to a real problem, the potential existence of which had been proven many times over in other jurisdictions. Therefore, the ordinance should be sustained under this Court's ruling in *Young*.

II. RENTON WAS JUSTIFIED IN RELYING ON THE EXPERIENCE OF OTHER CITIES TO ESTABLISH THE ADVERSE SECONDARY EFFECTS OF ADULT THEATRES.

The Ninth Circuit's treatment of Renton's reliance on the experience of other cities was inconsistent and confusing. On the one hand, the court wrote: "[w]e do not say that Renton cannot use the experiences of other cities as part of the relevant record upon which to base its

³⁰ *See Young*, 427 U.S. at 78-79 (Powell, J., concurring).

³¹ *Id.* at 84.

actions * * * (App. 19a). On the other hand, the court apparently ruled against Renton in part precisely because of this reliance. It held: "[a]lthough the Renton ordinance purports to copy Detroit's and Seattle's, it does not solve the same problem in the same manner" (App. 17a; emphasis in original); Renton must "justify its ordinance in the context of *Renton's* problems—not Seattle's or Detroit's problems" (*id.*; emphasis in original); and "Renton has not studied the effects of adult theaters and applied any such findings to the particular problems or needs of Renton. The studies done by Detroit on the problems of concentrating adult uses are simply not relevant to the concerns of the Renton ordinance—the proximity of adult theaters to certain other uses" (App. 19a).

The Ninth Circuit obviously misunderstood the significance to Renton of the studies on the secondary effects of adult theatres as experienced in other cities. Renton relied on the studies and experiences of other cities not to dictate how Renton should respond to adult theatres in Renton, but rather to establish that adult theatres do indeed have adverse secondary effects—lowered land values, increased crime, and the like.³²

However, instead of allowing Renton to rely on the studies and experiences of other cities, the Ninth Circuit would require Renton or any other small city to conduct its own study on the effects of adult theatres before en-

³² In *Young*, it was noted that the location of adult theatres "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere" (427 U.S. at 55; plurality opinion). The concentration "causes the area to deteriorate and become a focus of crime * * *" (*id.* at 71 n.34). The influx and concentration of such theatres results in a "cycle of decay" (*id.* at 81 n.4; Powell, J., concurring).

In Seattle, as noted above, the concerns included "the attraction of transients, parking and traffic problems, increased crime, decreasing property values, and interference with parental responsibilities for children." *Northend Cinema*, 595 P.2d at 1155.

acting a zoning ordinance. Such a requirement is patently unreasonable for several reasons. First, Renton passed its ordinance at least nine months before any adult theatre even announced its intention to enter Renton. There were no adult theatres within the City to study. Surely a small city need not wait until an adult theatre has entered and the city has conducted its own study on the theatre's adverse secondary effects before it may take action. Because the adverse secondary effects are magnified and therefore even more pernicious in a small residential community, it is all the more imperative for a city to fulfill its "duty * * * to protect the well-being and tranquility of a community"³³ by taking preventive measures against them.

Second, Renton did not need to prove what had already been proven elsewhere. A small city need not hire the same experts who testified in other cases to repeat their testimony on the results of their research. This would be a wasteful and expensive duplication of time and effort—to no purpose. Moreover, the costs would undoubtedly be prohibitively high for many small city or town budgets.

Furthermore, the Ninth Circuit failed to note that the Detroit ordinance approved in *Young* was itself based in part upon the experiences of other cities. The evidence introduced before the Detroit City Council "consisted of reports and affidavits from sociologists and urban planning experts, as well as some laymen, on the cycle of decay that had been started in areas of other cities, and that could be expected in Detroit, from the influx and

³³ *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949) (footnote omitted). See also *Breard v. Alexandria*, 341 U.S. 622, 640 (1951); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916) ("It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury but obstacles to a greater public welfare").

concentration of such establishments." 427 U.S. at 81 n.4 (Powell, J., concurring) (emphasis added).³⁴

Before enacting its ordinance, Renton took more than adequate steps to assure itself that adult theatres do have adverse secondary effects and that the particular cities on which Renton was relying had experienced those effects. Renton officials reviewed the *Young* and *Northend Cinema* decisions, which set forth the results of the studies on the effects of adult theatres (JA 167, 267-268).³⁵ They also studied a "summary of findings and conclusions of the City of Seattle relative to the adoption of their zoning ordinance * * *" (JA 170). Renton's officials considered a report from the Municipal Research and Service Association of Washington Cities which reviewed adult theatre cases (JA 168). The Renton City Council received comments from its own land use planning professionals relating the experiences of other cities, as well as a "comprehensive report from the [Renton] City Attorney's office relating to the proper scope of land use regulations and experience from other cities" (JA 27).

After reviewing all of the above material, Renton had more than enough information to conclude that adult

³⁴ Experts in *Young* recited their experiences in many different cities and towns in Michigan (Appendix in *Young* at 18-19), New York City (*id.* at 30, 35), and cities in countries as far away as Sweden, Denmark, West Germany, France, Britain and Italy (*id.* at 32).

³⁵ The Ninth Circuit correctly noted that *Young* focused on the effects of concentration of adult theatres (App. 19a). But this Court would not have emphasized the need to experiment (427 U.S. at 71; plurality opinion), or approved both the concentration and dispersal methods of treating the problems (*id.* at 62, 71), if only the secondary adverse effects of clustering justified zoning. Moreover, Renton did not rely solely on *Young*. For example, the study conducted in Seattle, which was discussed in *Northend Cinema*, analyzed land uses around adult theatres, some of which were located in downtown areas and others of which were scattered in residential areas. *Northend Cinema*, 585 P.2d at 1155.

theatres do cause adverse secondary effects. But Renton's officials went even further and held public meetings and listened to its own citizens express their concerns over the adverse secondary effects of adult theatres. Whether these citizens were using their own common sense or basing their fears upon what they had been told about other cities is irrelevant. A city council is entitled to respond to such rational concerns. Renton also heard from citizens of other cities as to what had, indeed, happened elsewhere. It is not important that those from other jurisdictions were not experts, or that they did not cite specific surveys, studies, or statistics in regard to what they had perceived. One does not have to be an expert to observe and relate the obvious.³⁶

If the Ninth Circuit meant that Renton failed to prove with sufficient particularity what had occurred elsewhere, it was simply wrong. The results of the City Council's inquiry were not conflicting or ambiguous. There was evidence creating a legitimate concern that the entry of even one adult theatre into Renton's small central business district would have numerous and serious deleterious effects. Property values in the area surrounding that theatre would decrease. Nearby businesses that were not themselves engaged in adult uses would suffer financial harm. The incidence of crimes such as prostitution and assault would rise in the immediate vicinity of the thea-

³⁶ In an analogous situation, the Court has pointed out that "a robust common sense" can substitute for hard evidence:

The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data. [*Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).]

tre. Many people would be reluctant to use parks and churches located nearby. Families with young school children who walked through the adult use area would find it more difficult to instill those moral and ethical values that form the backbone of solid family relationships.³⁷ Furthermore, the City Council's conclusions have been fully supported by literature of a more scientific nature.³⁸

The Ninth Circuit's requirement that a city create its own record of local degradation before taking action drains the vitality from the important municipal interests recognized in *Young*.³⁹ The very purpose of city

³⁷ This Court's decisions have established that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. 494, 503-504 (1977) (footnote omitted).

³⁸ E.g., Report from Carl I. Delau, Captain, to John Kukula, Deputy Inspector, Cleveland, Ohio Police Department, *Smut Shop Outlets: Contribution of These Outlets to the Increased Crime Rate in the Census Tract Areas of the Smut Shops* (August 24, 1977); Department of City Planning, City of Los Angeles, *Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles* (City Plan Case No. 26,475, June 1977); Marcus, *Zoning Obscenity: Or, the Moral Politics of Porn*, 27 Buffalo L. Rev. 1, 9 & nn.43-44 (1977); Department of Metropolitan Development, Division of Planning, Indianapolis, Indiana, *Adult Entertainment Businesses in Indianapolis: An Analysis* (Feb. 1984); MacKinnon, *Pornography, Civil Rights and Speech*, 20 Harv. C.R.-C.L. L. Rev. 1, 41 (1985); Planning Department, City of Phoenix, *Adult Business Study* (May 25, 1979). See also Appendix in *Young* at 5-6, 19-20, 24-25, 30-32.

Among the secondary effects of adult entertainment businesses found in these studies and surveys were increases in crime, especially prostitution and other sex crimes, and negative economic impact on both residential and commercial property.

³⁹ This requirement was rejected by the District Court below (App. 30a), has been properly rejected by other courts, and, we submit, should also be rejected here. For example, the Seventh Circuit has held:

A legislative body is entitled to rely on the experience and findings of other legislative bodies as a basis for action. There

planning, and zoning in particular, is to anticipate, to foresee, and, by planning ahead in an even-handed way, to further important, legitimate city interests⁴⁰ and to obviate adverse secondary effects. Although there was no way that Renton could pinpoint exactly what harm would result from the entry of an adult theatre into Renton—whether, for example, an adult theatre would cause an adjoining grocery store to lose 3% or 25% of its business, whether a particular child would be corrupted by this environment, or how often certain crimes would occur—Renton's conclusion that there would be adverse secondary effects was soundly based on the experience of other cities.⁴¹

is no reason to believe that the effect of congregated adult uses in Peoria is likely to be different than the effect of such congregations in Detroit. [*Genusa v. City of Peoria*, 619 F.2d 1203, 1211 (7th Cir. 1980).]

The California state courts also disagree with the approach taken by the Ninth Circuit. In one case, for example, a court wrote that "this thesis would deny to lawmakers in one locale the benefit of the wisdom and experience of lawmakers in another community, no matter how similar the circumstances; it would, as it were, require the reinvention of the wheel countless times over when mere access to common knowledge would render the considerable effort involved unnecessary." *County of Sacramento v. Superior Court*, 137 Cal. App. 3d 448, 455, 187 Cal. Rptr. 154, 158 (1982). Accord: *City of Vallejo v. Adult Books*, 167 Cal. App. 3d 1169, 213 Cal. Rptr. 143, 149 (1985); *Strand Property Corp. v. Municipal Court*, 148 Cal. App. 3d 882, 887, 200 Cal. Rptr. 47, 49 (1983).

⁴⁰ *Memphis v. Greene*, 451 U.S. 100, 187 (1981); *Moore v. City of East Cleveland*, 431 U.S. at 503-504; *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

⁴¹ Moreover, were a city to await the entry and deleterious effects of adult theatres, it would run the risk encountered by other cities of being accused of drawing its zoning lines with the intent of closing down a particular theatre (or theatres) already operating within its borders. See, e.g., cases cited in the Jurisdictional Statement at 11-12 & n.24.

For Renton to have assumed that it would *not* experience what had already occurred in other cities would have been the height of irresponsibility. This was not, after all, an isolated city or a city with characteristics wholly dissimilar from those of its neighbors. It was, as Playtime's president noted, on the "South End" of Seattle and near other communities in Washington where Playtime's own adult theatres had already operated. The evidence before the City Council was devoid of any indication that the effect of an adult theatre would be any different in Renton than in Seattle or elsewhere.

In holding that Renton did not justify its ordinance in the context of Renton's concerns (App. 19a), the Ninth Circuit apparently overlooked the foundation of Renton's ordinance. In determining the best method for Renton to deal with the effects of adult theatres, Renton relied upon the advice of its Policy Development Director, who had years of land use planning experience.⁴² As demonstrated by his testimony,⁴³ he and his staff were fully familiar with every aspect of the city's plats, zones and uses. Furthermore, Renton heard from its citizens at public meetings, including the head of the Renton Chamber of Commerce and the Superintendent of Schools. There was really nothing more for Renton's officials to learn about the City as a basis for its zoning ordinance.

The Ninth Circuit failed to accord Renton "a reasonable opportunity to experiment" in dealing with the adverse effects of adult theatres as required by *Young*.⁴⁴ This Court there specifically held that it was for local authorities and not the Court to select a zoning scheme. In so doing, the Court stated that "we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments,

⁴² JA 25, 56, 75, 103-106, 174, 213.

⁴³ JA 25-30, 53-91, 100-211, 248-280.

⁴⁴ *Young*, 427 U.S. at 71 (plurality opinion).

*either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. * * ** It is not our function to appraise the wisdom of its [the Detroit City Council's] decision to require adult theaters to be separated rather than concentrated in the same areas."⁴⁵ Thus, the fact that Renton's ordinance uses the set-aside approach⁴⁶ rather than dispersal does not make *Young*'s holdings any less applicable in this case.

Like many other small cities, Renton could not afford extensive on-site sociological surveys of the probable impact of adult theatres. Instead, it drew upon the wealth of experience that has emerged from other cities across America and enacted an ordinance to protect and preserve its residential and commercial areas from deleterious effects of adult theatres. Renton's ordinance furthers these "important and substantial" interests specifically recognized in *Young* and should be upheld.

III. RENTON'S ORDINANCE LEAVES SO MUCH ACCESSIBLE LAND AVAILABLE FOR ADULT USES THAT FIRST AMENDMENT RIGHTS ARE RESTRICTED ONLY INCIDENTALLY.

In *Young*, this Court upheld the Detroit adult land use zoning ordinances without subjecting them to any requirement that the land left available for adult uses be of any minimum size or contain any particular types of existing uses. The Court focused on the city's justification for regulating adult uses rather than on the economic desirability to the operators of the available areas. The most that can be drawn from the plurality's opinion with re-

⁴⁵ *Id.* at 62, 71; emphasis added.

⁴⁶ Renton chose to place its adult theatres in one section of the City, but away from homes, schools, etc., much like Boston and certain other cities have done. American Society of Planning Officials, Planning Advisory Report No. 327, *Regulating Sex Businesses* 7-8 (May 1977); Marcus, *supra* n.38, at 3; F. Strom, *Zoning Control of Sex Businesses* 62-64, 103-126 (1977).

spect to the "availability" of land is that an ordinance might be struck down if the area off limits to adult theatres was so nearly total that "the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech" (427 U.S. at 71 n.35). The plurality ruled that the District Court's findings conclusively established that this was not the case in *Young* (*id.*).

A comparison of the District Court findings and underlying evidence in *Young* with the findings and evidence in this case demonstrates that Renton has afforded adult movie operators more than ample opportunity for expression. In *Young*, the Court relied on the following District Court finding in determining that the ordinance did not suppress speech:

The Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the City of Detroit which must be over 1,000 feet from existing regulated establishments. This burden on First Amendment rights is slight. [427 U.S. at 71 n.35, quoting 373 F. Supp. at 370.]

The express findings of the trial court in the instant case were substantially identical.⁴⁷

Even if one were to look beyond the findings here to the underlying evidence, it is clear that Renton's geographic limitation in no way "suppresses" speech or "greatly restricts" access to it. Renton's original ordinance effectively set aside approximately 400 acres where adult theatres could locate, and this was expanded to 520 acres when certain mistakes were corrected and the restriction in relation to schools was reduced from one mile to 1000 feet (JA 213). This zone therefore accounted for more than 5% of the entire land area of Renton (as compared with Seattle's set-aside zone of less than 1% of its acre-

⁴⁷ *E.g.*, App. 27a-28a.

age⁴⁸). The set-aside area is large enough to accommodate well over 400 theatres and surrounding parking lots.⁴⁹ Its acreage is larger than one-fourth of the entire area of Renton occupied by single-family residences and exceeds the amount of land in the City used for either multi-family residences, commercial uses, or parks and recreation (JA 26). Witnesses for both Renton and Playtime testified that part of the 520 acres is simply unoccupied land, undeveloped or in the process of being developed.⁵⁰ Some of the land is already developed and in use—there is an "industrial or light manufacturing area and, then, there was another area that we went by that was developed with retail businesses".⁵¹ Playtime's own witness conceded, by way of example, that if the Shakey's Pizza and the Burger King located "at the edge of a shopping center" could be acquired "and a 400-seat theatre could be put in there, I would think that would be a viable location for, you know, an adult theatre" (JA 240-241). He also admitted that some properties in the area were for sale.⁵² The District Court found that the zone available to adult theatres was comprised of land "in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads * * *" (App. 28a).

⁴⁸ JA 30.

⁴⁹ Playtime's own attorney assumed that an adult theatre seating 400 persons would require 6000 sq. feet of space (JA 145-147, 149). Renton's Policy Development Director testified that such a building would need 40,000 additional sq. feet for parking, plus or minus 10% for error, or a maximum total of 52,000 sq. feet for the entire theatre area (JA 145-149). A 520-acre area would encompass 22,651,200 sq. feet, or some 435 theatre areas.

⁵⁰ JA 85, 213, 219, 221-222, 240, 262.

⁵¹ JA 240; *see also* JA 213, 223-224, 240-241, 262.

⁵² JA 219, 221-222.

Nevertheless, the Ninth Circuit concluded that these 520 acres were "unavailable" for adult theatres. Of course, its most fundamental error lay in failing to rely on the District Court's express findings to the contrary, which are not clearly erroneous. But even viewing the record *de novo*, it is not easy to divine why the Ninth Circuit thought the set-aside zone was "unavailable" and suppressed speech (App. 13a-14a). The court's sole basis for such a conclusion must have been that part of the zone was unoccupied and that part was already occupied and in use. As to certain of the existing uses, the court simply misread the record.⁵³ Even apart from its factual errors, the Ninth Circuit's thesis is exceedingly curious.

First, it is uncontroverted that, while part of the zone may be occupied, an area large enough to contain numerous theatres is not. Second, the type of area to which Playtime seeks to gain access—the downtown business district—is by definition an area that is densely developed. If the present occupation of land is the measure of "availability," then downtown Renton is certainly less "available" than the area now open to adult uses.

Third, the Ninth Circuit's approach gives the adult theatre owner a preferred position above every other po-

⁵³ The court cited such properties as the Longacres Racetrack and a sewage plant as being within the set-aside zone, when in fact the racetrack and the plant are clearly outside the zone (see maps at App. 140a-142a). The confusion can only be accounted for by the fact that the court relied on a map, and accompanying testimony, submitted at the early TRO hearing prior to the time that the permissible distance from schools was reduced from one mile to 1,000 feet (see JA 25-31, incl. map; JA 66-67, 217-228, 272, 276-277). The map also contained a number of errors because it had to be prepared within a few hours' time (JA 164-165, 263-265, 272, 273-274, 276-279). The TRO testimony, prior to correction, estimated the size of the set-aside area to be approximately 400 acres, with about half of it unoccupied (JA 30, 57, 126, 199), and many of the "uses" included by the Ninth Circuit fell outside the zone (compare map at JA 31 with map at JA 215). With the errors corrected and the amended ordinance taken into consideration, the set-aside area became substantially different (and larger) (JA 215).

tential purchaser of property. He does not have to compete in the marketplace for land like everyone else, including drug stores, hair salons and theatre owners showing regular fare. Even the business offices of the press, also protected by the First Amendment, enjoy no such privilege.⁵⁴ Under the Ninth Circuit's thesis, a city must insure the existence of a "turnkey" location for the adult theatre operator; property must stand ready to be sold to such an operator from a willing seller. But the fact that some present owners express no immediate desire to sell cannot reasonably be deemed a disqualifying factor. It is a fact of commercial life faced by all potential purchasers regardless of the nature of the applicable zoning restrictions.⁵⁵ Moreover, the fact that land is currently occupied does not mean that it could not be had at a price determined by the market. Owners constantly change their minds, either voluntarily or through the vicissitudes of business life. There was certainly no indication in *Young* that space would be immediately available in the areas to which the adult theatres would be forced to move, and there should be no such requirement here.⁵⁶ Finally,

⁵⁴ Churches, too, must obey zoning laws in the free exercise of their religions and must buy property under the ordinary rules of supply and demand. See *American Communications Ass'n v. Douds*, 339 U.S. 382, 397-398 (1950); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307-309 (6th Cir.), cert. denied, 104 S. Ct. 72 (1983).

⁵⁵ Playtime's real estate witness could not testify that all property owners within the set-aside zone would not sell. Some owners told him they would sell, some said they did not think the property was "suitable" for this use, and he could not reach others (JA 218-224). And even some 22 acres owned by the City is not wholly immune from sale to third parties. Minutes, Renton City Council, Sept. 24, 1984, at 1.

⁵⁶ Given the accessibility of the available zone, the protest that box office revenues may be lower there than elsewhere is unavailing. In addition to the fact that there is no record proof of this premise, there is no basis in the Constitution or in this Court's decisions for the thesis that a city is required to permit adult uses at the

the fact that others have already built or bought in the zone demonstrates that it is a frequented, accessible, and economically viable area. This is especially the case where, as here, the existing uses include "a fully-developed shopping center" (App. 14a).⁵⁷

In sum, the fact that part of the set-aside zone is presently occupied does not make that part, much less the zone as a whole, "unavailable." Renton submits that a set-aside zone should be deemed "available" when it is accessible—both in terms of distance from populated areas of the city and in terms of internal streets and highways—and when prospective theatre operators can build or buy a theatre there at such time as property becomes available in the ordinary course of business.

The Renton set-aside zone easily meets this test. It is within 15 to 20 minutes from any point in Renton, the entire city being only 15.3 square miles in size. The record shows that patrons will drive such distances to view adult movies. For example, one of Playtime's most profitable theatres is located in Point Roberts, Washington, a town of only 250 people. That theatre draws 1500 patrons a week from Canada — principally from Vancouver, British Columbia, which is from 20 to 40 minutes away (JA 244, 375-376, 377-378). Playtime's own president conceded that Renton is an "area that you can

location or locations that an adult movie operator deems economically optimal, regardless of the adverse secondary effects. "The inquiry for First Amendment purposes is not concerned with economic impact * * *." *Young*, 427 U.S. at 78 (Powell, J., concurring).

⁵⁷ An industrial park within the zone (App. 13a) also is available for adult movie uses. Unrebutted testimony indicated that adult theatres would be an allowable use in areas designated "industrial park" (JA 88). In fact, Renton's Policy Development Director noted that it might be very appropriate for adult theatres to locate in these areas; "[i]f it's on a major arterial in an industrial area, it would provide an excellent opportunity for shared use of parking, different traffic pattern usages, which would make better use of the property" (JA 176).

draw everything into" (JA 392). As far as residents of adjoining suburbs and Seattle are concerned, Renton's set-aside zone is *more* accessible than Playtime's downtown location, due to the proximity of freeways.

The zone is accessible, and it has adequate parking facilities. Descriptions of access show that the zone is bounded and criss-crossed by highways, streets and roads from two to four lanes wide.⁵⁸ Moreover, there are plans for further street improvements, and contracts have already been let to widen some lanes.⁵⁹ Traffic problems were discussed many times with the City Council (JA 265), and the City's Policy Development Director testified that the zone was at least equal to or better than the downtown area, particularly since downtown, where Playtime's theatres are located, is congested.⁶⁰

Adoption of the Ninth Circuit's "availability" theory, which permits a court to disregard a large and accessible set-aside zone, would make it impossible for many small residential cities like Renton to implement effective adult use zoning. The secondary effects of adult theatres are likely to be greater in a small suburb than a large city, due to the theatres' inevitable relative proximity to residential areas. At the same time, however, a small municipality tends to have less land "available" for adult uses and thus would be forced to open up areas where the secondary effects of adult uses will be especially great. In this way, the Ninth Circuit approach affords a small city like Renton lesser means to protect itself against secondary adverse effects than a city like Detroit, which has more space and larger areas containing compatible land uses. By any realistic standard, Renton's set-aside zone is available for adult uses and is fully adequate to

⁵⁸ JA 82, 89-90, 91, 213-214, 242, 257-259.

⁵⁹ JA 87, 89-91, 213-214, 257-258.

⁶⁰ JA 259-260, 261, 265-266.

permit theatre owners to present, and any interested patrons to see and hear, adult movie fare.⁶¹

IV. RENTON'S OTHERWISE VALID ORDINANCE SHOULD NOT BE STRUCK DOWN BASED ON AN INFERENCE AS TO THE SUBJECTIVE MOTIVATIONS OF COUNCIL MEMBERS.

Having concluded that Renton could not justify its ordinance by its concern about the secondary effects of adult theatres, the Ninth Circuit went on to hold that the City had also failed to prove the absence of an improper motive. According to the Court of Appeals, Renton was required to prove that its motives were entirely benign—i.e., that distaste for the content of adult films played no role whatever in the passage of the zoning ordinance. The court purported to derive this standard from *O'Brien's* requirement that a law be based on a state interest “unrelated to the suppression of free speech” (App. 19a). Because it discerned an inference of “mixed motives” here (App. 20a), the court struck down the ordinance. This approach was incorrect for several reasons.

1. Neither *O'Brien* nor *Young* contemplates an inquiry into legislative motive.

The decision in *O'Brien* makes clear that, once a substantial state interest has been identified, and the limitations on First Amendment rights are determined to be “incidental,”⁶² courts may not go beyond that determina-

⁶¹ This case is thus at the furthest extreme from *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), where nude dancing was entirely prohibited.

⁶² 391 U.S. at 377. As Justice Harlan pointed out in his concurring opinion, *O'Brien* “manifestly could have conveyed his message in many ways other than by burning his draft card” (*id.* at 389).

We have shown in parts I-III that any restraint on Playtime and its customers is entirely incidental. The greatest harm Playtime

tion in a search for some other, perhaps improper, motivation. The Court could hardly have made the point more clearly. It reviewed in some detail the proffered governmental interest in preserving the integrity of the Selective Service System, and thus individual draft cards. Having concluded that the interest was a legitimate one, and one that the particular regulation was well suited to serve, the Court then held that it was sufficient to justify the modest imposition on speech that resulted. The Court did *not* go further and speculate about what other purposes—legitimate and illegitimate—might also be served by the law. It was the presence of legitimate interests, not the absence of illegitimate ones, that was central to the Court's reasoning in *O'Brien*.⁶³

To make matters even clearer, the Court in *O'Brien* then expressly refused to undertake the exact inquiry that the Ninth Circuit found to be necessary here. Faced with respectable evidence that some members of Congress may have viewed the legislation as an effective means of limiting criticism of the Vietnam war, the Court refused

can assert is that it cannot locate in the heart of Renton's very small downtown business district and must instead locate in an area that can accommodate over 400 theatres, which is within 15-20 minutes by car from any point in Renton. On the other hand, by zoning to prevent the deleterious secondary effects of adult theatres, Renton was engaging in what Justice Powell has called perhaps the most essential function performed by local government (*Young*, 427 U.S. at 80; concurring opinion). Its interest in preventing the “cycle of decay” that had become evident in *Young* five years before Renton acted and had been increasingly duplicated since then was substantial and compelling. See *O'Brien*, 391 U.S. at 376-377.

⁶³ Cf. Emerson, *First Amendment Doctrine and the Burger Court*, 68 Calif. L. Rev. 422, 472 n.16 (1980) (whether free expression has been abridged is the basic issue).

See an analogous discussion in *United States v. Albertini*, 53 U.S.L.W. 4844, 4848 (U.S. June 24, 1985) (the effect of a time, place and manner restriction is controlling, and the fact that some imaginable alternative might be less burdensome on speech does not invalidate the restriction).

to give any weight to this possibility. Noting that "[i]nquiries into congressional motives or purposes are a hazardous matter," the Court declined to set aside a statute "which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it" (391 U.S. at 383, 384).

This same approach was followed in *Young*. In that case, the plurality began by asking whether there were legitimate governmental interests that could justify limited regulation of the location of adult theatres (427 U.S. at 62-70). Having determined that there were, and that First Amendment rights were minimally implicated, the plurality then simply looked at the Detroit ordinances themselves to ensure that their actual terms corresponded with the justifications put forward by the city (*id.* at 71-73). At no time did the plurality attempt to identify possible ancillary purposes on the part of City Council members.⁶⁴

As the Court noted in *O'Brien*, courts do look at intent when they are *interpreting* legislation, "because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading" the legislative purpose (391 U.S. at 383-384). But in so doing, they are looking only at the meaning of statutory language and what the legislators said about it on the record. An inquiry into legislative *motives*, undertaken for the purpose of testing the validity of a statute, is "an entirely different matter" (*id.* at 384).

A serious effort to establish the "real" reasons why a law was passed would require a court to reconstruct the complex political dynamic that is at work in any leg-

⁶⁴ This was despite the fact that the adult theatre owners in that case had argued that the Court need not accept assertions of legislative purposes at face value and that the mere recitation of a benign purpose was not an automatic shield against inquiries into actual purposes underlying the statutory scheme. Brief of Respondents American Mini Theatres, Inc. and Pussy Cat Theatres of Michigan, Inc., No. 75-312, at 36-37.

islative body. Such an inquiry would be hampered by the fact that various legislators may support a law for their own idiosyncratic reasons. Indeed, many of them may have mixed motives themselves. Moreover, much of the relevant information simply will not be available to a court as it passes on a statute months, or years, after its enactment. In sum, it is a rare circumstance in which a court can say anything with much confidence about the subjective motives of an entire legislature.

2. Even if motive is a proper subject for inquiry, the Ninth Circuit used an overly restrictive test.

Even if the Ninth Circuit was correct in its view that it could look into legislative motive in this case, it incorrectly held that the mere inference of an improper motive required that the ordinance be struck down. The proper test empowers a court simply to determine that a legitimate motive in fact was present, not to disregard proper motives on the basis of a possibly improper one.

The general practice of this Court, in those cases where motive has become the subject of inquiry, has been to place the emphasis on the existence of a legitimate motive, not the possibility of a mischievous one.⁶⁵ Thus, the

⁶⁵ This Court has pointed out that "inquiry into legislative motive is often an unsatisfactory venture" and has declined to engage in such a venture even when the legislative motive was suspect. *E.g.*, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983) (plurality opinion); *Palmer v. Thompson*, 403 U.S. 217, 224 (1971).

The Court has authorized invalidation of a statute based on a finding that impermissible racial motives entered into the legislative process. Compare *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-270 (1977), with *Hunter v. Underwood*, 105 S. Ct. 1916 (1985). This special rule reflects the felt need to eliminate all forms of race-based legal distinctions. See *Village of Arlington Heights*, 429 U.S. at 265 ("racial discrimination is not just another competing consideration"). Since virtually any domestic legislation may have some unforeseen disparate impact on various racial groups, there is no objective way of determining which laws are infected by racial prejudice. Instead, it becomes necessary to look at legislative intent

Court has refused to invalidate otherwise valid governmental action so long as it was motivated at least in part by a purpose within the legitimate powers of the acting body, even where some improper motive also played a role.⁶⁶ Put differently, at most a court may demand that the proffered state interests have been *among* the purposes actually in the minds of legislators—i.e., that it not be a total fabrication.

The Ninth Circuit came at the intent issue from the other end. By requiring that there be no element of illegitimate motive whatever in the legislative process, the Court of Appeals has set at risk any legislation passed under circumstances where improper motive played even a minor role, regardless of how important the other legitimate state goals may be. In practice, this test may prove an almost impossible hurdle in cases involving matters of controversy, where accusations about wrongful motives are easy to come by and hard to disprove. That problem is, in fact, well illustrated by the result in this case, where an unsupported “inference” of bad motive has so far prevented the City of Renton from pursuing legitimate goals through the means explicitly authorized by this Court in *Young*.

as the only available means of differentiating among facially neutral laws and determining which should be invalidated because they reflect continued efforts to suppress racial minorities. *But see Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 285-287 (1977).

⁶⁶ See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464, 470 (1981) (“We are satisfied * * * that the [asserted state interest] * * * is at least one of the ‘purposes’ of the statute * * *”); *McGinnis v. Royster*, 410 U.S. 263, 276 (1973) (“So long as the state purpose upholding a statutory class is legitimate and nonillusory, its lack of primacy is not disqualifying”). See also *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (“If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control”).

Motivational analysis might be appropriate where the proffered justification for the challenged regulation is obviously a sham, but such is clearly not the case here.

3. Even if intent is a proper inquiry, there is no basis for a determination that Renton's City Council was improperly motivated.

Even if the Ninth Circuit was correct in looking at the purity of the City Council's motives in this case, there was no basis in the record for its “inference” that there were improper motives. On the contrary, the statements and circumstances that accompanied the enactment of this ordinance make it clear that Renton was engaged in a good-faith effort to apply the teaching of *Young* in its own context. While the Ninth Circuit's failure to elaborate on what it meant by “an inference” of improper motive complicates the analysis, it is clear that Renton's City Council was not unduly influenced by impermissible purposes.

First, if the Ninth Circuit found an inference of improper motive in the comments of some citizens at public meetings, the District Court was correct in dismissing these as a reason for invalidating the ordinance that ultimately evolved. The District Court noted that the City Council heard statements from citizens who “[p]redictably * * * expressed concerns reflecting their values which might be impermissible bases for justification of restrictions affecting first amendment interests” (App. 31a). Inclusion of these comments, according to the trial court, “should not negate the legitimate, predominate concerns of the City Council nor lessen the value of the circumstantial evidence of adult land uses' effects in nearby cities” (*id.*). Thus, in ruling that the inclusion of citizen concerns was “not a material consideration” (App. 32a), the District Court implicitly held that Renton successfully rebutted Playtime's allegation of improper motive.

Moreover, the motives of some citizens should not automatically be imputed to the City Council. *Village of*

Arlington Heights, 429 U.S. at 267-270.⁶⁷ City councils should not be held responsible for the fact that some citizens do not like adult films. The effect of the Ninth Circuit's ruling on city governments would be that hearings preceding the adoption of zoning ordinances would have to be canceled or closed to the public, or speakers would have to be approved and pre-censored. None of these steps is practical, and they may even be unconstitutional in denying citizens their own First Amendment rights to speak. See *City of Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 174-176 (1976). Most jurisdictions (including the State of Washington) require by law that such proceedings be open to the public, precisely so that citizens can express a wide variety of views on the subjects under consideration. The Ninth Circuit approach would constitute an invitation to adult theatre owners such as Playtime to induce citizens to appear at hearings and express impermissible views in order to invalidate any subsequently-enacted ordinance, no matter how well intended by the legislature.

If, on the other hand, the Ninth Circuit's "inference" derives from the findings of the City Council itself, the court, we submit, simply misread them. First, the findings that grew out of the March 5, 1981, public hearing (App. 81a-85a) specifically recognized the legitimacy of the First Amendment rights being asserted in this case: the City would prevent the harmful secondary effects of

⁶⁷ The record in *Young* showed that a number of Detroit citizens complained about pornographic content. For example, one resident whose letter was introduced into evidence complained to the Mayor, "They have pornography available in their back room, and it is disgusting * * *" (Appendix in *Young* at 26), and an attorney for the city conceded: "The concern of the neighborhood over the showing of this kind of movie has been evidenced time and again by picketing, by calls and letters to our office, to the Mayor, to the Common Council and so on" (*id.* at 48). Yet the Court declined to address the issue of legislative intent.

adult theatres in the central business district and surrounding neighborhoods "while providing to those who desire to patronize adult entertainment land uses such an opportunity in areas within the City which are appropriate for location of adult entertainment uses" (Finding 17). The findings also set forth the reason for zoning in advance of the entry of adult uses (Finding 5), and recited the "blighting" and "skid row effect" that had already made themselves evident in other cities (Finding 14). In this latter respect, it was noted that the impact in Renton would be "significantly larger" than in other cities because of Renton's smaller size (*id.*).⁶⁸

Second, *every one* of the 20⁶⁹ findings related to the secondary effects of adult theatres and to the relationship between an adult theatre's location and the magnitude of those secondary effects.⁷⁰ None of them referred to the content of the films themselves except by the use of the word "adult" in describing the theatres—a reference approved in *Young*. These findings reflect the City Council's adequate factual basis for its conclusion that its ordinance would minimize the inevitable secondary effects of adult theatres.⁷¹

⁶⁸ Renton's population, for example, is only 7% of Seattle's (JA 30).

⁶⁹ Findings 18, 19 and 20 were misnumbered "19", "20" and "21." Numbers 19, 20 and 21 will be treated here as 18, 19 and 20.

⁷⁰ All 20 of them referred to the "land uses" to which the theatres would be put, and seven of them referred to their "close proximity" (Findings 3, 4, 8, 9, 11, 13, 19).

⁷¹ Cf. *Moore v. City of East Cleveland*, 431 U.S. at 500 (challenged ordinance had only "a tenuous relation to alleviation of the conditions" sought to be relieved); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 95-96 (1977) (ordinance banning "For Sale" signs on lawns not necessary to maintain integrated community).

Third, each of the concerns expressed in these findings was approved in *Young* and/or *Northend Cinema*. These were concerns over (a) whether people would frequent residences, churches, parks, public facilities and schools located in the immediate vicinity of adult theatre uses;⁷² (b) whether both residential and commercial values would be adversely affected by these uses;⁷³ (c) whether there would be an increase in crime, including sexual offenses and assault;⁷⁴ (d) whether retail trade, and consequently tax revenues, would be reduced;⁷⁵ and (e) whether there would be an adverse impact upon children, and upon the ability of parents and schools to teach family values if these children constantly passed adult theatres on their way to or from schools or commercial areas.⁷⁶ Moreover, the City Council found no evidence that these adult land uses would improve the community's commercial viability.⁷⁷

Six additional findings (App. 85a-86a) grew out of the February 25, 1982, public hearing, which was held *after* the original Ordinance 3526 was enacted but *before* the amending Ordinance 3629 was adopted on May 3, 1982 (App. 81a). The amending ordinance *broadened* Playtime's rights—it reduced, for example, the proscribed area around schools from one mile to 1000 feet and effectively added approximately 120 acres to the set-aside zone. It would be difficult to read into such findings an intent to restrict or suppress speech when they supported an amendment accomplishing exactly the opposite result.

⁷² Findings 1, 3, 4, 11, 13, 16, 18.

⁷³ Findings 4, 5, 11, 13, 14, 17, 18, 20.

⁷⁴ Finding 12.

⁷⁵ Finding 13.

⁷⁶ Findings 2, 6-9, 19.

⁷⁷ Finding 15.

Three of these six findings again emphasized the negative secondary effects caused by the location of adult theatres near other incompatible uses.⁷⁸ Four spelled out in more detail the adverse influence upon children and the family already cited in the previous findings—the influence of pornography external to the home, the loss of sensitivity to the adverse affect of pornography upon children and established family relations and the concept of non-aggressive consensual sexual relations, the disruption caused to youth programs, and the like.⁷⁹ The final two findings cited once again the decline in property values and the blight that could be anticipated,⁸⁰ and noted the very practical problem caused by citizens outside of Renton viewing film fare “away from areas in which they are known and recognized.”⁸¹

Preventing children's exposure to the decay surrounding adult theatres is surely a legitimate and substantial governmental interest.⁸² As this Court has said as to zoning in another context: “It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.” *Village of Belle Terre*, 416 U.S. at 9.⁸³

⁷⁸ Findings 2, 5, 6.

⁷⁹ Findings 1, 2, 5, 6.

⁸⁰ Finding 4.

⁸¹ Finding 3.

⁸² Playtime's complaint cannot possibly be that the City Council intended to prevent children from seeing these films, because theatres do not allow children to see X-rated movies, which is all these theatres offer.

⁸³ See also *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-512 (1981) (plurality opinion) (city has substantial interest in urban aesthetics); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (among other things, zoning can promote “morality”); *Paris Adult Theatre I v. Slaton*, 413 U.S. at 58 (citizens have legitimate interest in protecting the “quality of life” and “the total community environment”); Wilson, *The Urban Unease: Community vs. City*, 12 Public Interest 25 (1968); cf. L. Tribe, *American Constitutional Law* § 12-19, at 677-679 (1978).

Moreover, because the choice of where to make a home and raise one's family is one of the most important decisions individuals face,⁸⁴ the kinds of concerns put forth here by Renton are *precisely* the kind that a small community can and should properly address.⁸⁵

It would be ironic indeed if a city could zone adult theatres because of considerations such as the lowering of commercial and residential property values and an increase in crime, and not on the ground that these theatres have an unstable and debilitating effect on the children and families living in those same areas. Such a result would elevate property values above human values. The stability and cohesiveness of families, and parents' efforts to raise their children in suitable surroundings free from crime and blighted areas, are also worthy of protection. If a city can use its police powers to advance aesthetic values,⁸⁶ it can surely protect the even more basic human values advanced by Renton.

In light of the compelling state interest in zoning and the resulting incidental impact on First Amendment rights occasioned by this ordinance, the Court should not examine legislative intent. If legislative motivation is subject to review, the focus of the inquiry should be on the presence of legitimate motives, rather than a search for an improper one. In any event, the Renton City Council's reasons for enacting its ordinance clearly withstand scrutiny.

⁸⁴ See, e.g., *Linmark Assocs., Inc.*, 431 U.S. at 96.

⁸⁵ As this Court noted in *Ginsberg v. New York*, 390 U.S. 629, 639-641 (1968):

The well-being of its children is of course a subject within the State's constitutional power to regulate * * *.

In *Prince v. Massachusetts*, *supra* [321 U.S. 158 (1944)], at 165, this Court, too, recognized that the State has an interest "to protect the welfare of children" and to see that they are "safeguarded from abuses" which might prevent their "growth into free and independent well-developed men and citizens."

⁸⁶ E.g., *Members of the City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118, 2129 (1984).

CONCLUSION

We are dealing in this case with very *practical* problems. As noted in our Jurisdictional Statement, cities and towns across the country have struggled since *Young* to regulate the location of adult entertainment establishments within their borders. Only a few of these zoning ordinances have been upheld—in fact, only one federal Circuit has sustained the validity of a *Young*-style adult theatre ordinance on the merits.⁸⁷

As Renton's City Council saw it, the influx into the City of adult theatres was inevitable, not only because these theatres were already located in other Washington cities and towns but because, as one *amicus* has put it, "[a]s a result of the growth of the adult business industry, together with the adoption of zoning ordinances regulating adult businesses in larger cities, many adult businesses are relocating in these smaller adjacent cities."⁸⁸ Renton attempted to deal with this potential problem in advance, and in an even-handed fashion, without regard to the location of particular theatres or the content of particular films.

The City did not designate the smallest possible area it thought was constitutionally mandatory. In terms of size and accessibility, its set-aside zone was far more commodious than the bare minimum necessary for First Amendment purposes. The ordinance was ingenious in its effect, because it kept adult theatres away from the family-oriented areas of the City where they would have the undesirable secondary effects that the City was attempting to avoid, while still creating a large, accessible area where patrons could go to view adult films. In other words, the City did not simply set aside an arbitrary zone which might or might not have resulted in adult theatres

⁸⁷ *Genusa v. City of Peoria*, *supra*.

⁸⁸ Brief *Amicus Curiae* of City of Whittier, *et al.*, in support of Jurisdictional Statement, at 4-5.

being contiguous to schools, businesses, and the like; instead, the City established the proper distance from the areas it was seeking to protect, and these restrictions in turn created the zone where such theatres might locate.⁸⁹

In view of the fact that Renton's zoning efforts did not diminish the exercise of free expression, its ordinance—which is even less restrictive than that approved in *Young*⁹⁰—should be upheld.

Respectfully submitted,

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⁸⁹ In essence, the Renton's ordinance is no more than a reasonable time, place and manner restriction of the type approved in other cases. See, e.g., *Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065, 3071-72 & n.8 (1984); *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981); *Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n*, 447 U.S. 530, 535-536 (1980); see also *Young*, 427 U.S. at 63.

⁹⁰ Renton's requirement of continuous exhibition and "appeal to a prurient interest" precludes regulation of any incidental or innocent exhibition of sexually explicit material. Its ordinance therefore satisfies the concerns expressed by Justice Blackmun in his dissenting opinion in *Young*, 427 U.S. at 88-96.

AUG 14 1985

JOSEPH F. SPANGL, JR.

CLERK

No. 84-1360

In The
Supreme Court of the United States
October Term, 1984

THE CITY OF RENTON, et al,

Appellants,

vs.

PLAYTIME THEATRES, INC.,
a Washington Corporation, et al,

Appellees.

On Appeal From The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

1. Should this Court unnecessarily reach and decide constitutional issues before the Courts below have finally decided an issue which may resolve the case without the need for further constitutional adjudication?

2. May a zoning ordinance whose operative provisions rest solely upon the content of motion pictures shown within a theatre be characterized as a time, place or manner restriction of speech?

3. Is it constitutionally permissible to regulate the location of a motion picture theatre, based solely upon the content of the films exhibited, where there is no empirical evidence to establish any secondary effect from a *single* adult theatre?

4. Does confining adult theatres to remote, commercially unviable and unavailable locations create a burden on access to the marketplace for sexually explicit motion picture films?

5. Is it constitutionally permissible for a city to rely on the experience of other cities in passing a zoning ordinance regulating adult theatres when the means chosen to remedy the perceived effects are not justified by the studies and findings of the cities upon which it relies?

6. Is it constitutionally permissible under the equal protection clause of the Fourteenth Amendment for a city to regulate the location of a motion picture theatre because of its alleged secondary effects while refusing to regulate other similar businesses?

7. Is the definition of "used" void for vagueness because it fails to establish minimal guidelines to govern local functionaries in application of the definition to a business presenting protected First Amendment materials?

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STATEMENT OF CASE

Appellants' statement of the case preposterously overstates the legislative history of Renton Ordinance No. 3526. For this reason, it is necessary to resummariize that history in order to correct the misleading impressions left by Appellants.

The genesis of the ordinance before the Court was a memorandum dated May 22, 1980 from the Mayor to the Council President (JA 411). The memorandum indicated a concern for responding to the "*public outcry*" after an adult business had obtained a license and suggested the passage of legislation "which would designate *non-acceptable enterprises/localities*" (JA 411). It is significant that the ordinance was conceived in this setting, rather than one concerned with the secondary effects, if any, of such uses.

On June 23, 1980, the Renton City Council undertook to study "the subject of adult bookstores, films and novelty shops" by referring that matter to the Planning and Development Committee of the City Council (JA 38). After almost three months of delay and no documented study, the Planning and Development Committee of the City Council recommended to the City Council that the matter be referred to the Planning Commission. On September 8, 1980, the matter was referred to the Planning Commission "for consideration at the earliest possible date" and for public hearings (JA 39-40).

On October 13, 1980, a moratorium resolution was adopted relative to the licensing of businesses selling or showing sexually explicit materials (JA 41). To the extent that any governmental interest is set forth in the legislative history of Ordinance No. 3526, it is contained in

the "Whereas" provisions of the resolution imposing the moratorium. There, the only reason asserted for the ordinance is an undocumented, unstudied, and speculative perception that a business which "sells, rents or exhibits sexually explicit material would have a severe impact upon surrounding businesses and residences" (JA 42). Accordingly, after October 13, 1980, no theatre could locate anywhere in Renton even though no findings of harm yet existed.

Approximately two (2) months later, the chairman of the Planning Commission referred the matter of "Adult Entertainment Land Uses" back to the Council for further action indicating that the Planning Commission was overburdened with priorities of a much greater magnitude (JA 289-291). After reference back, the Planning Development Committee scheduled a public meeting; however, no one showed up and the meeting was rescheduled to March 5, 1981 (JA 45). On April 6, 1981, approximately eleven months after the notion of an "adult entertainment land use" ordinance was first conceived, the Planning Development Committee filed its report with respect to "Adult Entertainment Land Use" (JA 47). The report sets forth no findings relative to the need for such an ordinance nor does it articulate or identify any compelling governmental interest that would be served by the regulation of adult motion picture theatres. Additionally, no reasons or need are specified for the locational requirements suggested by the report. From this record, it is impossible to determine what, if any, secondary effects a *single* adult motion picture theatre might present or why the focus of the ordinance suddenly shifted from "adult entertainment land uses," which was the primary concern in *Young v. Ameri-*

can Mini Theatres, 427 U.S. 50 (1976), to a concern about the effects of a *single* adult motion picture theatre.¹

On April 13, 1981, as the moratorium resolution was expiring, Ordinance No. 3526, the first of three ordinances at issue here, was passed (JA 49). The recording of the Council hearing on April 13, 1981 reflects that the full Council heard no public testimony on the ordinance and passed it after approximately five (5) minutes consideration.² Ordinance No. 3526 provided that an adult motion picture theatre was prohibited:

- (1) Within 1,000 feet of any residential zone, *or single-family or multiple-family use*;
- (2) Within *one mile* of any public or private school;
- (3) Within 1,000 feet of any church or other religious facility or institution; and
- (4) Within 1,000 feet of any public park or P-1 zone.

The effect of this ordinance, even as later amended, was to virtually ban adult theatres from all commercial areas of the city and from the areas where general audience theatres may locate.

1. Renton's ordinance does not purport to prohibit a concentration of regulated uses; rather, it is concerned with the effect that a single adult theatre would present. The ordinance has the effect of banning a single adult motion picture theatre from all areas of the city unless it can meet specified distance requirements from certain protected uses. As applied, the ordinance must be scrutinized in relation to Appellees' single theatre inasmuch as there are no other adult theatres in Renton even today (Appellants' Brief at 3, n.2) and the City acknowledges that it is concerned about the entry of even a single such use (Appellants' Brief at 25).

2. Exhibit 1 to the hearing held June 23, 1982, was a cassette tape recording produced by the City of Renton. This tape included the entire discussion of the full council in passing Ordinance No. 3526. The transcript of the hearing, found as Document 152 in the Clerk's papers, at pages 17-18, shows the admission of this tape into evidence.

Early in 1982, Appellees acquired two existing and operating theatres in the City of Renton with the intention to continue exhibiting feature-length motion pictures in them and, in at least one of them, exhibit sexually-explicit adult films. The theatre building where the sexually-explicit movies were to be exhibited was located in an area that was lawfully zoned for the use of exhibiting general audience films, but was proscribed by Ordinance No. 3526 for use as an adult theatre, prompting Appellees to commence the present action.

While the case was pending, in May, 1982, Renton enacted Ordinance No. 3629 which amended Ordinance No. 3526. The principal changes were:

- (1) The amending ordinance contained an elaborate statement of the reasons for enacting both Ordinance No. 3526 and Ordinance No. 3629;
- (2) A definition of the word "used" was added;
- (3) Violation of the use provisions of the Ordinance was declared to be a nuisance *per se* to be abated civilly;
- (4) The required distance of an adult theatre from a school was reduced from one mile to 1,000 feet; and
- (5) A severability clause was added.

The amending ordinance, No. 3629, also contained an emergency clause making it effective as of the date of its passage. It was patently obvious that the amendments were prompted by the commencement of Appellees' lawsuit and were motivated by the City Attorney's desire to formulate a more defensible ordinance.³

3. The elaborate statement of reasons for enacting Ordinance No. 3526 contained in Ordinance No. 3629 was nothing more than an attempt on the part of the city attorney to provide some means of shielding the ordinance from the constitutional attack of Appellees. These amendments immediately followed

(Continued on following page)

On June 14, 1982, Appellants passed yet a third ordinance, No. 3637, which was identical to Ordinance No. 3629 in all respects, except that the emergency clause was deleted. The ordinance became effective thirty (30) days following its publication.⁴

Ordinance No. 3526 was passed at a time when the City of Renton had no theatres which exhibited sexually-explicit adult films. No written or recorded legislative history exists from which it is possible to discern exactly what was considered by the Renton City Council in enacting the ordinance. The independent recollection of the Planning Director, who attended all hearings relative to the enactment of the ordinance, and who personally, and through his staff, studied the question of regulating *all* adult uses, is the sole history available to us today.⁵ From his testimony, and other discovery, we know that the City of Renton did *nothing* to study the effects of adult businesses, and particularly adult theatres, upon the community.

The Planning Director acknowledged that no factual testimony regarding the effects of adult entertainment uses on the neighborhood or business districts of Renton was received or considered (JA 134). To see if any reliable written material was considered, Appellees required that Renton produce all studies done or considered by the Planning Department and Planning Staff in the prepara-

(Continued from previous page)

the deposition of the Planning Director who, in his testimony of March 3-4, 1982, had been unable to identify any secondary effect at which this ordinance was aimed. The fact that the distance requirement from schools was relaxed from one mile to 1,000 feet is particularly indicative of this intent. See *Krueger v. City of Pensacola*, 759 F.2d 851, 856 (11th Cir. 1985).

4. The third ordinance was passed as a response to Appellees' challenge to the second ordinance because of its inclusion of an unconstitutional emergency clause.

5. Appellants' Brief at 6, n.5; JA 131-134.

tion of the ordinance. A number of documents were produced; however, none was a study or report relative to the alleged secondary effects of an adult theatre or any other adult entertainment use. Rather, all the material produced dealt with the *legality* of regulation, not the reasons and underlying justifications for regulation (JA 166-170).⁶

To further examine the underlying factual predicate for the ordinance, the Planning Director was queried relative to his statement that he had reviewed "the summary of their findings and conclusions" relative to the City of Seattle zoning ordinance (JA 74). He admitted that what he was referring to was simply the published decision in *Northend Cinema, Inc. v. City of Seattle*, 90 Wn.2d 709, 585 P.2d 1153 (1978), cert. denied, 441 U.S. 946 (1979), and a discussion of judicial opinions that had been prepared by the Seattle City Attorney (JA 170). Although Seattle had conducted studies, none of those underlying studies was considered by Renton prior to the adoption of Renton's Ordinance No. 3526 (JA 170).

One of the concerns expressed at the Renton public hearing on March 5, 1981 about adult entertainment uses was an alleged increased incidence of assaults and prostitution. No effort was made to verify this assertion (JA 172).⁷ In order to determine the magnitude of the problem, if any, Appellees requested production of:

....

5. All reports, letters, studies or other forms of communications of the City of Renton Police Department

6. At least one court has indicated that a review of "how to" material is insufficient to provide a factual justification for an ordinance that burdens free speech. *Patel and Patel v. City of South San Francisco*, 606 F. Supp. 666, 671 (1985). Such material does not include any studies or abstracts of studies dealing with the deleterious impact, if any, of an adult entertainment business.

7. See *infra* at 24.

or *any other law enforcement agency* relative to the crime associated with the location of adult businesses in general, and in the City of Renton, in particular.

No documents were produced in response to this request.

Another concern of the public recalled by the Planning Director was an assertion that property values would be affected by adult uses. When questioned about this, he admitted that he did not contact any businesses located next to or in the vicinity of an adult business anywhere in the State of Washington to verify this assertion, *nor did he gather or attempt to gather any empirical evidence regarding this assertion*.⁸

When queried concerning the impact of an adult theatre on schools, children, churches, and parks, the Planning Director was unable to identify any "secondary effect" of any kind, let alone a "land use" effect from such a business.⁹

Contrary to what Appellants would have this Court believe, little, if anything, was studied by the Planning Department, and little, if any, of the written material available to the Planning Director was made available to the full council. In fact, much of the material available to the Planning Director was never reviewed by him (JA 168-170). Assertions and conclusions about the "secondary effects" of adult theatres, standing alone, on a record as barren as the one before this court, are not sufficient to support an ordinance which regulates speech on the basis of its content. A careful review of the record here will fail to find any fact or any admissible bit of evidence to support the belated post hoc conclusions on which the ordinance is purportedly based.

8. See *infra* at 24.

9. See *infra* at 24-26.

Finally, even if Renton had actually considered any studies done by other cities (which they clearly didn't), the studies of other cities cited in Appellants' brief at 26, n.38 were, for the most part, based on the secondary effects of *concentrations* of adult uses and not on the effect of a single theatre on its neighboring community.¹⁰

SUMMARY OF ARGUMENT

The Court of Appeals correctly found, after a de novo review of the entire record and on the basis of objective evidence in the record, that Renton's motives in passing Ordinance No. 3526 were suspect. Having made this determination, it expressly remanded the matter to the District Court for further proceedings. Inasmuch as no final resolution of this issue has been made by the District Court, this Court, consistent with its rule that it should refrain from unnecessarily reaching and deciding constitutional issues, should dismiss the appeal on the basis of having improvidently noted probable jurisdiction.

Renton's ordinance cannot be sustained as a reasonable place regulation of speech because its restrictions turn on the content of speech; i.e., it is not content-neutral. If the ordinance is to be sustained, it must survive the strict scrutiny analysis mandated by *Young and Schad*. To survive, the ordinance's restrictions must be tailored to par-

10. The studies cited by Appellants are not generally available, are not in the record below and have not been provided to this court. We have read many of these studies and have found none which supports the proposition that a *single* adult theatre would cause secondary effects. There is no indication that these studies relate to any effects other than concentration. Additionally, none of these studies is of a "scientific nature" inasmuch as none was prepared using scientific methodology nor have they been presented to a scientific body or published in a scientific journal.

ticular problems which are sufficiently compelling to justify the burden on First Amendment rights. The burden must be no greater than necessary to serve the asserted interest. Renton's ordinance cannot survive this scrutiny for a number of reasons. First, Renton has failed to identify any adverse secondary effect at which the ordinance is aimed. Secondly, the restrictions of the ordinance are far greater than necessary to achieve any legitimate governmental interest. Finally, the burden on protected speech is substantial.

Renton's purported reliance on the experience of other cities cannot be justified because Renton relied primarily on "how to" material rather than studies or abstracts of studies. In addition, Renton has fashioned an ordinance far more restrictive than that of any city upon which it relies. The studies and experiences of those cities will not support or justify what Renton has done.

The burden on speech imposed by Renton's ordinance is substantial. For all practical purposes, access to the marketplace has been eliminated inasmuch as there are no viable or available locations within Renton. There is an intended de facto ban on adult theatres from the city. In determining what "access" means in the constitutional sense, this Court must be guided by the commercial needs of the particular mode of expression and the unique operational characteristics of such a use. Any focus on the content of the material or the fact that individual citizens may be morally offended by it, must be disregarded. If this Court were to allow nonphysical aesthetic considerations, which relate solely to the content of the protected speech, to be a basis for municipal zoning decisions, the First Amendment would no longer have any meaning or vitality.

In addition to the reasons given by the Court of Appeals, the ordinance is violative of the equal protection

guarantees of the Fourteenth Amendment and void for vagueness. Employing the "strict scrutiny" test, since fundamental rights are involved, there is no basis in the record to justify singling out adult theatres for special regulation while exempting other similar uses such as adult bookstores, adult video tape stores, bars, taverns, and burlesque theatres. Finally, in application, the operative language of the ordinance used to determine if a theatre is an adult theatre is void for vagueness. The determination of what constitutes a "continuing course of conduct" is left to the unfettered discretion of city officials. Moreover, city officials are employing a definition of "prurient interest" which means whatever the city council or vocal citizens of Renton chose it to mean.

On the record before the Court, Renton's ordinance cannot be sustained under any theory.

ARGUMENT

I. CONSIDERATION OF THE ISSUES RAISED BY APPELLANTS IS PREMATURE IN LIGHT OF THE COURT OF APPEALS REMAND FOR A DETERMINATION OF LEGISLATIVE MOTIVE

The record below compellingly demonstrates that many of the stated reasons for Renton Ordinance No. 3526 were no more than expressions of dislike for the subject matter (App 19a-20a, 91a-94a). This fact was recognized by the magistrate and the District Court (App 31a, 44a). The Court of Appeals found, reviewing the record de novo,¹¹ that the record raised "at least an inference that a

11. Contrary to the suggestion of Amicus, this Court's recent decision in *Bose Corp. v. Consumers Union of United States*,
(Continued on following page)

motivating factor behind the ordinance was suppression of the content of the speech as opposed merely to regulating the effects of the mode of speech" (App 20a). Based upon its decision in *Tovar v. Billmeyer*, 721 F.2d 1260 (9th Cir. 1983) and this Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), the Court of Appeals further found that Renton had not rebutted this inference (App 20a).

Because of the District Court's failure to make a finding on this issue, and in light of the unrebutted inferences in the record that the ordinance was improperly motivated, the Court of Appeals expressly remanded the case for a determination of whether the motivations for the ordinance were in fact improper, and, if so, for application of the rule established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270, and n.21 (1977) and *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), that the ordinance must fail unless the city could prove by a preponderance of the evidence that the law would have been enacted without this factor (App. 21a).¹² That this rule still pertains is apparent from this Court's recent decision in *Hunter v. Underwood*, 471 U.S. —, 105 S.Ct. 1916 (1985).¹³

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Inc., — U.S. —, 104 S.Ct. 1949, 1958 (1984) held that "in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.'"

12. The Court of Appeals has indicated that its decision does not conclusively resolve the controversy. In denying Appellees' motion for attorney's fees, the Court noted that the motion was premature and must abide the ultimate resolution of the issue by the District Court on remand (JA 409-10).

13. It is proper to apply this rule in the context of the First Amendment in light of the repeated holdings of this Court that purposeful governmental suppression of free expression is unconstitutional. See, e.g., *Central Hudson Gas v. Public Service Comm.*, 447 U.S. 557 (1980).

Inasmuch as the District Court made no finding on the issue of intent, the Court of Appeals' remand should not be disturbed if substantial evidence in the record exists to support its finding of an inference of improper motivation. The objective evidence available to the Court of Appeals consisted of the written legislative history and the testimony of the Planning Director as to the nature of the public testimony received by the City Council.¹⁴ No evidence of individual legislator's motives was offered or received on this issue.¹⁵

The available record is replete with objective signs of an improper motive. First, as found by the District Court and the Court of Appeals, many of the post hoc stated reasons for the ordinance are no more than expressions of distaste for the subject matter (App. 91a-94a). Secondly, the mile separation from schools required by Ordinance No. 3526, the first ordinance, was patently unreasonable and could only suggest an intent to restrict and suppress protected expression (App 79a). Third, the legislative process was commenced as a result of a communication from the mayor suggesting legislation to "respond to the *public outcry*" about adult businesses by designating "*non-acceptable enterprises/localities*" (JA 411).¹⁶ Finally, an

14. The exhibits reproduced at JA 39-52 and 411 constitute the entire written legislative history. No written or tape recorded record exists of the legislative hearings preceding the adoption of Ordinance No. 3526. The only evidence of what occurred came from Renton's Policy Department Director (See n.5 supra).

15. The Ninth Circuit has held that the use of subjective post hoc testimony of an individual legislator is impermissible to show legislative intent. *City of Las Vegas v. Foley*, 747 F.2d 1294 (9th Cir. 1984).

16. The memorandum from Mayor Shinpoch to Councilman Trimm which was the genesis of this ordinance, on its face, suggests an improper motive and is totally silent with respect

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environmental checklist review sheet prepared by the Planning Department staff, which indicated that the ordinance "possibly may be too restrictive to be practical," was ignored (JA 189). In light of this record, it is hardly surprising that the Court of Appeals reached the conclusion that there was an inference of improper motive. As noted by Justice Powell in his concurring opinion in *Young*, 427 U.S. at 80, the chronology and facts surrounding legislation may suggest that a city has embarked on an effort to suppress expression.

If on remand, the District Court finds that suppression of speech was a motivation for the ordinance and that it would not have been enacted but for that fact, then under the decisions of this Court, the ordinance is facially unconstitutional in its entirety. Such a resolution would obviate the need for further constitutional adjudication. See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. —, — S.Ct. — (1985) (never anticipate a question of constitutional law in advance of the necessity of deciding it). As such, Appellants' appeal to this Court is premature and this Court

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to any of the reasons now asserted by the City in support of the ordinance. This document, coupled with the meager record and legislative history surrounding the first ordinance, does not readily suggest any proper motive. In analyzing an analogous situation involving First Amendment concerns, the Eleventh Circuit in *Krueger v. City of Pensacola*, 759 F.2d 851 (1985), felt constrained to look behind the city's articulated post hoc justifications. It viewed the decisions of this Court as requiring more than simply an articulation of some interest the city could have had, saying that "[t]he government must also show that the articulated concerns had more than merely speculative factual grounds, and that it was *actually* a motivating factor" 759 F.2d at 855 (emphasis added). The Court found that judicial deference to "legislative psyche" did not mandate that they turn "a deaf ear to a record that establishes with unmistakable clarity the actual motives of the legislators" 759 F.2d at 856.

should refrain from unnecessarily reaching and deciding the constitutional issues raised by the Appellants.

II. RENTON'S ORDINANCE CANNOT BE SUSTAINED AS A REASONABLE TIME, PLACE OR MANNER RESTRICTION ON SPEECH

In *Young*, a majority of the Court found that the Detroit ordinances could be sustained as a reasonable place regulation of speech. *Young*, at 64, n.18 and 73 (Powell, J., concurring in Part II). Subsequent rulings by this Court require reexamination of this holding.

This Court has recognized the validity of reasonable time, place or manner regulations that serve a significant governmental purpose and leave ample alternative channels for communication. See *Clark v. Community For Creative Non-Violence*, 468 U.S. —, 105 S.Ct. 3065 (1984); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976). See also *Kovacs v. Cooper*, 336 U.S. 77, 104 (1949) (Black, J., dissenting). The essence of a time, place or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, (1980):

However, regulations of speech which are based upon the content of the speech stray beyond the recognized limits of a valid time, place or manner restriction.

A restriction that regulates only the time, place or manner of speech may be imposed so long as it is reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result). *Consolidated Edison Co.*, 447 U.S. at 536.

This Court has often repeated the rule that time, place and manner restrictions must be applicable to all speech, irrespective of content.

Governmental action that regulates speech on the basis of its subject matter 'slip[s] from the neutrality of time, place and circumstance into a concern about content.' *Police Department of Chicago v. Mosley*, 408 U.S. 92, 99 (1972), quoting Kalven, *The Concept of the Public Forum*; *Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 29. Therefore, a constitutionally permissible time, place or manner restriction may not be based on either the content or subject matter of speech. See, e.g., *Consolidated Edison Co.*, 447 U.S. at 536.

There can be no serious question that the Renton ordinances at issue here base their restrictions on the content of the speech involved in the motion pictures exhibited. The ordinances do not regulate the location of movie theatres; rather, they regulate where movies of a specified subject matter and content may *not* be shown. Appellees' theatre is properly located in a zone which allows motion picture theatres. It has existed as a motion picture theatre at its present location for several decades. Simply put, Renton's ordinances seeks to regulate and control the image on the screen inside the theatre. As a consequence, the ordinance cannot be sustained as a content-neutral time, place or manner regulation of speech. If it is to survive, it must do so under the strict scrutiny applied to ordinances restricting or regulating speech on the basis of its content.

III. RENTON'S ORDINANCE IS VIOLATIVE OF THE FIRST AMENDMENT

1. This Court Has Developed An Analytical Framework For Scrutinizing Zoning Ordinances Which Impinge Upon Fundamental Freedoms

Young, supra, is the seminal decision of this Court from which all municipal attempts to regulate the location

of adult businesses through zoning have flowed. The ordinances at issue in *Young*, "instead of concentrating 'adult' theatres in limited zones," required that "such theatres be dispersed." *Id.* at 52. They provided that an adult theatre could not locate "within 1,000 feet of any two other 'regulated uses' or within 500 feet of a residential area." *Id.* "Regulated uses" included ten different kinds of establishments in addition to adult theatres.¹⁷ Significantly, the ordinance was an amendment to an "anti-skid row ordinance" which had been adopted ten years earlier. *Id.* at 54. In the opinion of urban planners and real estate experts who supported the ordinances, the location of *several* such businesses in the same neighborhood tend "to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere." *Id.* at 55.¹⁸

In *Young*, there was "no claim that distributors or exhibitors of adult films are denied access to the market, or conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare." *Id.* at 62. The same is not true here. Appellees alleged and the Court of Appeals found that there was a substantial diminution of ac-

17. The other regulated uses were adult book stores, cabarets (group "D"), establishments for the sale of beer or intoxicating liquor for consumption on the premises, hotels or motels; pawn shops, pool or billiard halls; public lodging houses, secondhand stores, shoeshine parlors, and taxi dance halls. *Young*, 427 U.S. at 52, n.3.

18. No finding was made in *Young*, or any other case Appellees are aware of, that a *single* adult business, including an adult theatre, would produce the same adverse secondary effects as would several such businesses locating in the same area. In fact, as this court held in *Young*, per Justice Powell: "Most of the ill effects . . . appear to result from the clustering itself rather than the operational characteristics of individual theaters." *Young*, 427 U.S. at 82, n.5 (Powell, J., concurring).

cess to the marketplace for these nonobscene press materials (App. 13a).

The plurality opinion in *Young* held "that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." *Id.* at 70. This holding was based upon the rationale offered by the Detroit Common Council that a "*concentration* of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films." *Id.* at 71, n.34. The plurality opinion found that the record disclosed a sufficient factual basis for this conclusion. The essence of the plurality opinion, as evidenced by Justice Stevens' later writings, appears to be that the speech involved caused demonstrable adverse secondary effects.¹⁹

Justice Stevens, writing for the plurality, opined that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech," pointing out that the Detroit ordinances did "not affect the operation of existing establishments, but only new ones." *Id.* at 71, n.35. Absent the secondary effects, which provided a compelling governmental interest for regulation, the plurality was committed to the proposition that "the First Amendment means that government has no power to restrict expression because of its message,

19. See *Members of City Council v. Taxpayers for Vincent*, — U.S. —, 104 S.Ct. 2118, 2129 (1984); *Bolger v. Young Drug Products Corp.*, — U.S. —, 103 S.Ct. 2875, 2888 (1983) (Stevens, J., concurring in the judgment); *Metromedia Inc. v. San Diego*, 453 U.S. 490, 550 (1981) (Stevens, J., dissenting in part); *Schad v. Borough of Mount Ephraim*, 452 U.S. at 80, 83 (Stevens, J., concurring in judgment). *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 548 (1980) (Stevens, J., concurring in judgment); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 744-748 (1977);

its ideas, its subject matter, or its content." (Citations omitted) *Id.* at 65.

Justice Powell, whose concurring opinion represents the holding of the Court,²⁰ provided a distinctly different analysis. He placed a "substantial burden" on the state to justify its ordinances. *Id.* at 76. He viewed the inquiry for First Amendment purposes as looking "only to the effect . . . upon freedom of expression." *Id.* at 78. Part of this inquiry involves determining whether the ordinance restricts "in any significant way the viewing of these movies by those who desire to see them?" *Id.* On the record in *Young*, Justice Powell found the restrictions "incidental and minimal." *Id.* Justice Powell was careful to point out, however, that if the ordinances had been enacted "in an effort to protect citizens against the *content* of adult movies," the ordinances would not have withstood constitutional scrutiny. *Id.* at 81, n.4.

This Court's decision in *Schad*, *supra*, clarified many of the questions raised by *Young*. There, Justice White said, in writing for the majority:

[W]hen a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest. 452 U.S. at 68.

Another requirement is that the Court determine "whether those interests could be served by means that would be less intrusive on activity protected by the First

20. In *Marks v. United States*, 430 U.S. 188, 193 (1977), this Court held: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" Justice Powell's opinion was the opinion which concurred in the judgment on the narrowest ground.

Amendment." *Id.* at 70. Most importantly, *Schad* presented an analytical framework for scrutinizing zoning ordinances restricting First Amendment rights. First, the majority required supporting evidence for legislative assertions of reasons for enacting restrictive zoning laws. Finding that the asserted legislative reasons of *Mt. Ephraim* were "not immediately apparent as a matter of experience" (*Id.* at 73), the majority said:

[We] must assess the exclusion of live entertainment in light of the commercial uses *Mt. Ephraim* allows, not in light of what the Borough might have done. *Id.* at 75.²¹

Finally, the concurring opinions make it abundantly clear that the burden is on the zoning authority "to articulate, and support, a reasoned and significant basis for its decision" [*Id.* at 77 (Blackmun, J., concurring)] and to demonstrate "an identifiable adverse impact." *Id.* at 83 (Stevens, J., concurring in judgment).²²

2. Zoning Laws Which Infringe Upon A Protected Liberty Must Be Narrowly Drawn And Serve A Compelling Governmental Interest.

As a general matter, "The First Amendment means that government has no power to restrict because of the message, its ideas, its subject, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Governments must not be allowed to choose "which ideas

21. In the instant situation, the Court must assess the exclusion of adult theatres in light of the fact that Renton allows other commercial adult uses such as adult bookstores, adult video tape stores, massage parlors, bars, taverns, burlesque theatres, etc., and all the uses regulated by Detroit. (See n.17, *supra*).

22. It is not appropriate to utilize the test formulated in *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968) because the restriction on freedom of expression is substantial. See *Schad*, 452 U.S. at 69, n.7.

are worth discussing or debating . . .” 408 U.S. at 96. Nevertheless, governmental regulation based on subject matter has been approved in narrow circumstances. Such a regulation may be sustained “only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.” *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. at 540.

In the context of the ordinance now before the Court, it is recognized that the power of local governments to zone and control land use is broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both rural and urban communities. *Schad v. Mount Ephraim*, 452 U.S. at 68 (1980). However, the zoning power “must be exercised within constitutional limits.” *Moore v. East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring in judgment). When a zoning law infringes upon a protected liberty, it must be “narrowly drawn” and further a “substantial governmental interest.” *Schad*, 452 U.S. at 68.

Determining whether an ordinance meets this test requires “the courts to weigh the circumstances and appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of [First Amendment] rights.” *Schneider v. State*, 308 U.S. 147, 161 (1939). In addition, the court must also “determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment.” *Schad*, 452 U.S. at 70. Mere assertion of an important, legitimate interest does not satisfy the requirement that the challenged restriction specifically and precisely serves that end. See *Hynes v. Oradell*, 425 U.S. 610 (1976). See also *Cox v. Louisiana*, 379 U.S. 536, 557-558 (1965) (restriction must be applied uniformly and nondiscriminatorily). The court must examine carefully the importance of

the governmental interests advanced and the extent to which they are served by the challenged regulation. *Schad*, 452 U.S. at 71. “[T]he zoning authority must be prepared to articulate and support a reasoned and significant basis for its decision. This burden is by no means insurmountable, but neither should it be viewed as *de minimis*.” *Schad*, 452 U.S. at 77 (Blackmun, J., concurring).

In the case before the Court, Renton has restricted a particular mode of presenting a specified kind of speech from all commercial areas of the city while allowing that mode, presenting other kinds of speech, free access to all areas of the city. The test of these restrictions *must* be “strict scrutiny.”

3. The Governmental Interest Asserted By Renton Will Not Withstand Scrutiny.

Because the geographic configuration and commercial qualities of a city play an important role in determining the reasonableness of and need for a zoning law, it is relevant to examine these facets of Renton’s character.

Appellants attempt to paint a picture of Renton as a small bedroom community of residences, parks, churches, local shopping centers, and minimal commerce activity.²³ In fact, Renton is an active commercial and industrial city. The City of Renton is located at the southern end of Lake Washington. It is the third largest city in King County and the twelfth largest city in the State of Washington.²⁴ Renton’s economy is based on a strong manufacturing complex coupled with a diversified industrial/service complex. The largest employer and taxpayer within the City of Renton is the Boeing Commercial Airplane

23. Appellants’ Brief at 4.

24. 1983 Renton Annual Report, Table 21.

Company, which has two manufacturing facilities in Renton next to the Renton Airport on the shores of Lake Washington. The larger facility manufactures commercial jet aircraft (models 707, 727, 737, and 757).²⁵ The second largest factor in the city's manufacturing complex is Pacific Car and Foundry Company (PACCAR Incorporated). PACCAR has two manufacturing facilities, a truck parts warehouse and a computer center within the city. The manufacturing facilities produce railroad cars and carco winches.²⁶

There are 200 manufacturing firms in the Renton service area and a total of 290 distributor type firms.²⁷ Some of the manufacturing firms are distribution outlets as well. Over 68,000 persons are employed in manufacturing in the Renton service area.²⁸ Renton is home to 19 separate banks.²⁹ In 1982, Renton issued permits for construction of 57 industrial, office and other institutional, nonresidential, projects valued at \$22,937,000.³⁰ In 1983, permits were issued for similar projects valued at over \$37,839,000.³¹ Over 1,489 businesses are located in Renton, employing over 80,839 persons.³²

It is in this setting that the Court must scrutinize the governmental interests asserted by Renton.

The first question to ask is what compelling governmental interests have been asserted by Renton to justify

25. *Id.*

26. *Id.*

27. *Id.*

28. Market Profile Analysis, Seattle-Everett, Wa., SMSA, 1984 Edition, published by Donnelley Marketing Information Services.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

these ordinances. Ordinance No. 3526, on its face, asserts no reasons for its enactment (App 78a-80a). No record of the public hearings was made or preserved.³³ The city official who attended the original hearings testified that hearings were held, but little else (App 17a). Renton cannot point to any preenactment evidence in the record to justify the ordinance. In fact, the preenactment evidence strongly suggests that the ordinance was motivated by a desire to restrict constitutionally protected speech (JA 39-52, 411).

Ordinance No. 3637, adopted over a year after Ordinance No. 3526, and after the commencement of this lawsuit, contains a lengthy recitation of testimony allegedly received in support of the original ordinance (App 90a-91a). However, the statement of findings is a patent fabrication and invention. It is not supported by any record or testimony.

Despite the sanctity and reverence Appellants attach to the legislative process, the individual responsible for shepherding the ordinance through the process was not able to articulate any substantial reason to justify the ordinance from a "land use" point of view. He agreed that the only difference between a motion picture theatre and an adult motion picture theatre was the image on the screen (JA 176). As a land use professional, he could only identify two operational characteristics of an adult theatre different from other theatres; i.e., an unsupported opinion that the amount of traffic would increase because an adult theatre *might* draw from a larger area and a potential for garrish advertising signs on the exterior of the structure (JA 176-177). He acknowledged that the city has both a sign ordinance and a traffic code which it enforces (JA 177).

33. See notes 5 and 14, *supra*.

Additionally, the Planning Director was either unable to identify or support any of the alleged "secondary effects" the Appellants so fervently assert were studied and found to exist. When asked on what he based his conclusion that there would be an increase in the crimes of assault and prostitution from the location of a single adult theatre, the Planning Director said (JA 172):

To the best of my recollection, there was discussion at at least one of the policy or planning development committee meetings at which there was testimony given that crime of that type would be or could be expected with the implementation of adult entertainment.

He could not recall whether that testimony came from citizens or from a police department representative, nor did he attempt to verify this conclusion by contacting any small city within the State of Washington where one or two adult businesses were located (JA 172).

Another of the post hoc findings of the ordinance, made without any evidence, is that property values would be affected by an adult entertainment use. The Planning Director admitted that he had not contacted any business located next to, or in the vicinity of, an adult business anywhere in the State of Washington to verify this assertion (JA 174).

Asked about the adverse impact on children from an adult theatre located in the city's commercial areas, the Planning Director was not able to articulate what that impact would be (JA 190-191).

Q. What adverse impacts would there be on children? How would the mere image on the screen inside the building affect children?

A. As I recall the concerns, the public testimony was that material could have an effect on the people going and coming from the theatre and that as a result the children being educated could be affected.

Q. How?

A. I am not sure that I can answer that.

Q. So there was a perceived adverse impact, but you can't identify for me today exactly what that impact would be.

A. I think that's correct.

When asked about the adverse impact on churches, the Planning Director said (JA 191):

Q. Let me ask you the same question with respect to churches. What adverse impact would the operational characteristics of an adult motion picture theatre have on churches?

A. I believe that one of the characterizations made in the public testimony was that some parishioners might choose not to attend churches in the vicinity of adult motion picture theatres.

Q. . . . [W]as there any testimony the location of an adult theatre would adversely affect the church other than some people may not want to go to church?

A. To the best of my recollection, that's the gist of the testimony that was heard.

With respect to public and quasi-public buildings, he stated (JA 191):

A. I believe in particular the comment related to public parks and it followed the same general area of concern as was related to schools.

Q. And you can't identify what those impacts would be, just that people were concerned.

A. That's correct.

Finally, when asked to identify the adverse effects on neighborhoods, he said (JA 192):

Q. And what operational characteristic of an adult motion picture theatre would adversely affect residential zones or uses?

A. I believe it was the same area of concern as with schools and parks.

Q. In other words, somebody perceived there may be adverse impacts but couldn't identify what those specific effects or adverse impacts would be?

A. I can't restate them for you, no.

The Planning Director was totally unable to identify with any particularity the secondary effects at which the ordinance was aimed and acknowledged that there was no document, recording or record which could be looked at to determine the exact adverse impacts of adult uses on churches, schools, children, public parks and residential zones that the city council was attempting to address (JA 192-193). Having failed to identify any specific evils at which the original ordinance was aimed, Renton has totally failed to establish a compelling governmental interest or show that the regulations are narrowly drawn to serve that interest. How can this Court, or any court, perform the delicate task of determining whether Renton has chosen the least restrictive alternative to implement any alleged compelling governmental interest where the city has not even identified a demonstrable evil at which the ordinance is truly aimed?

The record below fails to demonstrate any "secondary effect" on society from the mere presence of a single adult theatre in proximity to the protected uses, nor is it "immediately apparent as a matter of experience" that a single adult theatre would pose problems more significant than those associated with general audience theatres or other adult businesses not subject to the restriction of this ordinance, such as taverns, bars, topless dance clubs, adult bookstores, burlesque theatres, etc. *Schad*, 452 U.S. at 73. This ordinance is not narrowly drawn to respond to what might be the distinctive problems arising from a single adult theatre. *Schad*, 452 U.S. at 74. In short, Renton has not sustained its burden of proving that a more selective approach³⁴ would fail to address the unique prob-

34. e.g., One less restrictive approach would be to prohibit pictorial advertising which could be viewed from the street by passersby.

lems, if any there be, of an adult theatre and that "its interests could not be met by restrictions less intrusive on protected forms of expression." *Schad*, 452 U.S. at 74.

4. Renton's Ordinance Cannot Be Justified By The Experiences Of Detroit And Seattle.

Appellants suggest that they may fashion an ordinance wholly different from that enacted by any other city by merely *asserting* that they had the same concerns in mind as those other cities.³⁵ Even if Renton need not establish its own factual predicate in every context, it may not justify this ordinance on the experience of other cities where those cities studied different problems and/or *chose other less restrictive means to solve the problems studied*.³⁶

In Detroit, the city fashioned an ordinance that required the dispersal of adult theatres and other regulated uses based upon the opinion of urban planners and real estate experts that the concentrating of *several* such businesses in close proximity to one another caused demonstrable secondary effects. *Young*, 427 U.S. at 55. The ordinances in *Young* eliminated no businesses and left available a myriad of locations *throughout the city* where adult theatres could locate. The evidence in *Young* suggested the broad proposition that the clustering together of eleven different kinds of regulated uses, causes identifiable secondary effects. The evidence presented there does not support the much narrower proposition that a single adult

35. See Appellants' Brief at 21-29.

36. In *Patel and Patel v. City of South San Francisco*, *supra*, the court refused to blindly accept the proposition (urged by Appellants here) that "[a] legislative body is entitled to rely of the experience and findings of other legislative bodies as a basis for action" [*Genusa v. City of Peoria*, 619 F.2d 1203, 1211 (7th Cir. 1980)], pointing out that the defendants could not point to a single instance in which a municipality had made a finding of fact—or other reference—having to do with an "adult motel."

theatre would, alone, have similar or greater secondary effects than other uses not regulated.³⁷ In fact, experience teaches us otherwise.³⁸

The experience of Detroit supports only a *dispersal* of regulated uses. Appellants have chosen to ignore that experience; i.e. the studies and testimony which supported that conclusion. They have, instead, adopted a much more restrictive approach than Detroit; i.e. they have banned adult theatres from all areas of the city unless the theatre is the prescribed distance from certain other uses. In application, there are no locations in a commercial area of the city. Having ignored the experience of Detroit, Renton must supply its own justification for restrictions that are of a completely different kind than those of Detroit and impose a significantly more substantial burden on First Amendment protected expression.

37. While Appellants have asserted that many secondary effects exist from a *single* adult theatre (Appellants' Brief at 25-26), they have not offered any evidence to support that assertion. See n.10, *supra*. An undeliberated and speculative legislative history will not support, on the basis of *Young*, an ordinance which regulates the location of the first and only adult theatre in Renton. See 754 *Orange Ave., Inc. v. City of West Haven, Conn.*, 761 F.2d 105, 112 n.6 (2nd Cir. 1985).

38. The Appellees, until recently, operated an "adult" theatre in Pasco, Washington, a city similar in size to Renton. In June, 1980, writing to the City Manager of Tacoma about the effects of an adult theatre locating in the commercial core of the city, the Pasco City Manager noted that when the theatre opened, there was a "hue and a cry" about the alleged effect of showing adult films. After approximately three years' experience with the theatre, the City found its fears to be groundless. "His adult theater (the only one in town) has not ruined adjoining businesses, and from what I can gather from my city hall vantage point, people around here have accepted the Theater and now have very little adverse to say about it. As a matter of fact, I have not had a single complaint about the operation in about a year." He went on to note that the downtown business community had accepted the theatre and that renovations made to it by Appellees had removed what had previously been an eyesore. A copy of this letter is included as Appendix A to this brief.

Likewise, Appellants can find no support for their ordinance in the experience of Seattle. The Seattle ordinance, found constitutional in *Northend Cinema*,³⁹ prohibits adult theatres in all zones of the city except for the CM (metropolitan commercial), BM (metropolitan business) and CMT (temporary metropolitan commercial) zones. Seattle, more precisely, confined adult theatres to the central commercial center of Seattle leaving available many commercially viable locations.

The only significant similarity between Renton's ordinance and those of Seattle and Detroit is that they all base their restrictions on the content of speech. Their dissimilarities in approach and means are striking. As the Court of Appeals observed, the conclusions, findings and studies in Detroit and Seattle will simply not support Renton's ordinance. Its restrictions go far beyond the type of ordinance that the findings of Detroit and Seattle would support.

Allowing a city to mimick other ordinances and rely solely on their "experiences" is risky business. The experience of other cities is not and should not be dispositive in determining whether a compelling governmental interest exists for a particular city.⁴⁰ In *Metro-media, Inc. v. San Diego*, 453 U.S. 490, 528 (1981), Justice

39. Appellees believe *Northend Cinema* was wrongly decided. In any event, the decision has no precedential value in this Court. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

40. In *Krueger v. City of Pensacola*, *supra*, an ordinance regulating topless dancing was challenged. Speaking directly to the issue of the City of Pensacola relying on the experience of another city, the Court said that merely mimicking another ordinance which had been found constitutional was not sufficient. The Court specifically pointed out that the crime control problems associated with topless dancing in Cocoa Beach [*Grand Falloon Tavern, Inc. v. Widmer*, 670 F.2d 943 (11th Cir.), Cert. Denied, 459 U.S. 859 (1982)], simply did not exist in Pensacola.

Brennan, speaking to this issue, said: "I would not be so quick to accept legal conclusions in other cases as an adequate substitute for evidence *in this case . . .*" (Emphasis in original). The so called "secondary effects" of an adult theatre undoubtedly depend upon a number of factors other than the mere existence of the theatre. As noted by Justice Powell in *Young*, "most of the ill effects . . . appear to result from the clustering itself rather than the operational characteristics of individual theatres." 427 U.S. at 82, n.5. To the extent that Renton's ordinance deviated from a dispersal ordinance to a much more restrictive one, this Court must require Renton, as the Court of Appeals said, "to justify its ordinance in the context of Renton's problems—not Seattle's or Detroit's problems."⁴¹

5. Renton's Ordinance Is Premised Upon An Intent To Suppress Constitutionally Protected Speech.

Other than the experiences of other cities, the findings contained in the preamble to Ordinance No. 3637 articulate only a distaste for the speech that is found in adult theatres. If the material presented in adult theatres offends the sensibilities of some, the ability of government "to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. at 21. The fact that in some settings, the operational characteristics of a business may justify appropriate regulations (e.g. an anti-concentration ordinance) does not justify an ordinance which subjects a business to additional restrictions premised or nothing other than a distaste for the type of speech there presented.

41. App. 17a.

At best, the findings of Ordinance No. 3637 suggests a purely aesthetic state interest to justify the restrictions on speech. Appellees allege, and the Court of Appeals found, that the asserted interest in aesthetics here is only a facade for content-based suppression (App. 19a). In *Members of City Council v. Taxpayers for Vincent*, supra, this Court recognized that in limited circumstances, a properly proven aesthetic interest can justify a restriction on the operational characteristics of a mode of expression. However, the point made in Justice Brennan's dissent, 104 S.Ct. at 2138, is particularly opposite to the Court's inquiry in this case:

An objective standard for evaluating claimed aesthetic judgments is therefore essential; for without one, courts have no reliable means of assessing the genuineness of such claims.

. . . In short, we must avoid unquestioned acceptance of the City's bare declaration of an aesthetic objective lest we fail in our duty to prevent unlawful trespasses upon First Amendment protections.

Renton has failed to independently identify any significant adverse secondary effect caused by the operation of a single adult theatre. Renton has also failed to identify any operational characteristic of a single adult theatre that would make its location a nuisance in either a commercial or residential area. As Renton has not prohibited all theatres from the commercial and neighborhood areas of the city, Renton's ordinance cannot be said to be genuinely concerned with the place of speech. Rather, it is only concerned with creating restrictions on the permissible locations for presenting constitutionally protected speech which it finds offensive. On this record, it cannot be said that Renton was attempting "to promote aesthetic values or any other value 'unrelated to the suppression of

free expression.’” *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977).

Renton simply has not demonstrated that the conversion of a single existing theatre building in the core of Renton’s commercial district from a general audience theatre to an adult theatre will have “an identifiable adverse impact on the neighborhood or on the [City] as a whole.” *Schad*, 452 U.S. at 83 (Stevens, J., concurring).

Moreover, it is apparent that Renton’s ordinance, in its second and third versions, was intended to protect citizens against the content of “adult” movies. Most of the twenty reasons given as forming the basis for adopting the original ordinance reflect a protective intent rather than a finding of adverse impact.⁴² Similar protectionism is seen in a majority of the “findings” from the February 25, 1982 public hearing.⁴³ These later “findings” (in reality conclusory statements) support no compelling governmental interest related to a demonstrable secondary *land use* effect of the location of an *adult* theatre. Rather, they express an impermissible reason for regulation; i.e., a distaste for the speech involved and a judgment that the speech involved is morally offensive. For example, Finding No. 2 states:

Location of adult entertainment land uses on the main commercial thoroughfares of the city gives an impression of legitimacy to, and causes a loss of sensitivity to the adverse effect of pornography upon children, established family relations, respect for marital relationship and for the sanctity of marriage relations of others, and the concept of nonaggressive, consensual sexual relations (App. 95a).

42. App. 91a-94a, particularly Findings 1, 2, 3, 4, 6, 7, 11, 16, 17, 18, 19 and 20.

43. App. 95a-96a, particularly Findings 1, 2, 3, 5, 6, and 7.

This is an assertion of a value judgment about the material exhibited. Nowhere in the legislative record is such a “finding” justified by the testimony or affidavits of any social scientist or other competent expert.⁴⁴

As another example, Finding No. 6 asserts that the location of adult land uses in certain areas “will cause a degradation of the community standard of morality” and “pornographic material will have a degrading effect upon the relationship between spouses” (App. 96a). This finding does not assert a compelling governmental “land use” interest. It is instead a moral judgment impermissibly used in an attempt to justify a restriction on constitutionally protected expression under the thinly veiled guise of a “land use” scheme.

In essence, Renton’s “findings” are simply those of an aversion to a particular type of constitutionally protected speech and to the places where such speech is presented. These types of “findings” are vastly different than the findings of the Detroit Common Council in *Young*. Renton’s findings cannot be predicated upon the research, testimony and experience of the Detroit Common Council in dealing with the “land use” effects from the concentration of eleven different kinds of regulated uses within a limited geographic area. Detroit made no finding that the location of a single regulated use, including an adult theatre, within the commercial or neighborhood areas of its city would have a deleterious effect; and, more importantly, it made no finding that the location of a single adult use

44. Neither Detroit (*Young*, *supra*) nor Seattle (*Northend Cinema*, *supra*) considered the effect of pornography upon established family relations, the marital relationship or the concept of nonaggressive, consensual sexual relations. A likely reason is that these are simply not “land use” considerations. Renton simply invented these “findings” after the commencement of this lawsuit in an attempt to justify the ordinance.

would cause "a loss of sensitivity to the adverse effect of pornography upon children, established family relations, respect for the marital relationship and for the sanctity of marriage relations of others, and the concept of nonaggressive, consensual sexual relations," or that such a use would have a degrading effect upon the relationship between spouses.

Viewed in the context of a legislative history that offers not one shred of support for such findings, the only conclusion to draw is that the ordinance was passed as a result of public distaste for the speech involved and with an intent to ban it from the city's borders.

6. "Reasonable Access" To The Marketplace For Speech Materials Requires More Than Just Designating Land Area Where It Is Permissible For An Adult Theatre To Locate.

Implicit in *Young* was the conclusion that a zoning ordinance "that does not reduce significantly the number or *accessibility* of theatres presenting particular films, stifles no expression." *Young*, 427 U.S. at 81, n.4 (Powell, J. concurring). The Court's footnote 35 began:

The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to lawful speech.

In *Schad*, it was not necessary for the Court to evaluate the meaning of "reasonable access" in different contexts as there were no locations where one could lawfully present live entertainment. Here, however, the issue is directly presented. The effect of Renton's ordinance on public access to sexually-oriented movies is substantial.⁴⁵

45. The Court of Appeals and the magistrate found that a substantial part of the so called available land is occupied by (1) a sewage disposal site and treatment plant; (2) a horse racing track and environs; (3) a business park containing buildings

(Continued on following page)

The real and intended effect is to make it commercially impractical for a distributor to enter the marketplace to the end that sexually-oriented movies never become available. While Renton does not deny that this is the intent and practical effect of its ordinance, it asserts that the mere designation of the availability of land, regardless of its commercial viability or its actual availability, is sufficient to avoid offending the First Amendment.⁴⁶ No court that has considered this assertion has accepted it.⁴⁷ As a matter of first impression, the issues of access and "availability" must be analyzed in the context of the commercial needs of a motion picture theatre, traditional zoning principles and the supportable legislative findings.

A motion picture theatre, whether it be a general release theatre or an adult theatre, is a people-oriented business. It must be located in a people-oriented environment that has regular nighttime traffic and complimentary businesses, such as fast-food outlets and restaurants (JA 230). A theatre location must be a place that people are willing to go to in the nighttime, and which provides easy parking and is generally a focal point of nighttime recreation activity (JA 230). Unrebutted expert opinion from the theatre operations manager of the largest general release theatre operator in the State of Washington was admitted to the effect that, with the exception of one location, all of the 520 acres of allegedly available land is "totally unsuited for use by a retail/recreation oriented

(Continued from previous page)

suitable only for industrial use; (4) warehouse and manufacturing facilities; (5) a Mobil Oil tank farm; and a fully-developed shopping center (App. 13a-14a, 41a-42a).

46. Appellants' Brief at 29-35.

47. See, e.g., *Purple Onion, Inc. v. Jackson*, 511 F.Supp. 1207 (N.D. Ga. 1981) and *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982).

business such as a motion picture theatre.”⁴⁸ In addition, while the area comprising the 520 acres is adequately served by roads, accessibility is difficult. Most of the 520 acres is so remotely located in relation to normal arterial traffic through the City of Renton that accessibility is difficult and confusing. In addition, none of the area within the 520 acres is near any area enjoying even minimal nighttime activity (JA 231).

A second expert testified that the same criteria used for choosing commercially viable sites for general audience theatres are also used to locate adult theatres (JA 283). For essentially the same reasons, this additional expert opined that the entire 520 acres, with one exception, was totally unsuited for an adult theatre (JA 241).

Even the city's own Planning Director testified that an appropriate land use area for a motion picture theatre might be in a neighborhood, “but [more] likely in an area where more general business activities occurred” (JA 175). He acknowledged that a motion picture theatre is a commercially oriented kind of business and that such businesses tend to locate in “areas where there is [sic] other commercial businesses generally of the same nature or intensity” (JA 176). Commercial businesses tend to locate together because of “compatibility of use, sharing of customer trade and traffic, activities of that type” (JA 176). The absurdity of forcing adult theatres to locate in industrial zones is clearly articulated by the city's own

48. JA 231. The one location which is potentially suitable is the small circled area on the map at JA 215. This area is prominently mentioned by Appellants in their brief at page 31 because it is, in fact, the only commercially viable site. However, this location is not suitable because of size limitations (JA 231) and is just a small dot when compared to the 520 acres of totally unsuitable sites.

Planning Director. While discussing the majority of the area where an adult theatre may locate, he said (JA 126):

I would think that as the most appropriate land use for the area that we would not be in favor of use other than an industrial use in that zoning:

It is important to note that practically none of the so-called “available” land is actually available for sale or lease (JA 216-228). A substantial portion of the 520 acres of legal locations is owned by Burlington Northern, Inc., a railroad company, and is criss-crossed with railroad tracks and spurs. Unrebutted testimony indicated that the corporate policy of Burlington Northern, Inc. was to reserve all of this land for rail user tenants and that the property would not be available for sale or lease to a theatre of any kind (JA 221). Land owned by the city was included within the “available” area even though the city acknowledged it would not sell or lease the land for an adult theatre use (JA 126, 223). A number of the parcels within the 520 acres were simply too small for construction of a theatre.

By restricting adult theatres to an area where no sites are in fact available and/or the available sites are not commercially viable, the city has effectively banned them. Appellees believe this result was intended. There can be no doubt that the *burden on speech is substantial if a theatre cannot find a location*. The result is the same as an outright ban. There is simply a de facto rather than a de jure ban on speech. If such a situation exists, as it does here, Appellees submit that unsupported and speculative land use concerns must give way to the paramount interests protected by the First Amendment, particularly where, as here, the record fails to reveal anything more than mere assertions to justify the ordinance and no effort has been made to utilize less restrictive means to cure

whatever problems the city may believe to inhere in the operational characteristics of a *single* adult theatre.

Other courts that have considered the question of "reasonable access" and "available locations" have done so in the context of the practical effect of such restrictions. Based upon evidence similar to that presented to the District Court herein, the Court in *Purple Onion, Inc. v. Jackson*, 511 F.Supp. 1207 (N.D. Ga 1981), found that sites the city contended were "available" and "adequate" were either "unavailable, unusable, or so inaccessible to the public that for all practical considerations, they amounted to no locations." 511 F.Supp. at 1217. The Court concluded that isolating adult businesses to industrial areas which are not close to residential areas, are poorly lit, lack parking and where there is little traffic or retail business and which are inconvenient to customers, causing such businesses to languish and fail, offends First Amendment principles. 511 F.Supp. at 1224. Moreover, although it appears that the Court believed the ordinance's restrictive effect to be intended, it nonetheless concluded that if the "effect" of an ordinance is to suppress or significantly restrict access to protected materials, the ordinance is void for violation of the First Amendment, regardless of its intent.

In *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982), the Court considered the same issue. There, the Court found that Galveston's ordinance banned adult theatres outright from all parts of the city except for certain undesirable industrial areas. 682 F.2d at 1214.⁴⁹

49. A quick glance at the aerial photograph and maps in the record, reveals that the practical effect of Renton's ordinance is the same. See Exhibit A-3, App. 142a and JA 215. Without question, adult theatres have been totally removed from the commercial areas of the city.

Rejecting the view of the District Court that the drawbacks of opening a movie theatre in an industrial area were simply the "reasonable economic burden that befalls some activity in every land use program," the Court concluded:

[W]hen a claim of suppression of speech is raised, an exclusive focus on economic impact is improper. "The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression." *American Mini Theatres*, 427 U.S. at 78, 96 S.Ct. at 2456 (Powell, J. concurring). 682 F.2d at 1214.

The court held that it was error to not consider the consequences to speech of confining adult theatres to "the most unattractive, inaccessible, and inconvenient areas of a city" citing *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 336 (5th Cir. 1981), (holding that the restriction of abortion facilities to undesirable areas places a significant burden on a woman's decision to have an abortion.)

Justice Stevens in his dissent in *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 553 (1981) developed a test which is useful in determining whether a zoning ordinance poses a threat to interests protected by the First Amendment.

First, is there any reason to believe that the regulation is biased in favor of one point of view or another, or that it is a subtle method of regulating the controversial subjects that may be placed on the agenda for public debate? Second, is it fair to conclude that the market which remains open for the communication of both popular and unpopular ideas is ample and not threatened with gradually increasing restraints?

Subjecting Renton's ordinance to this test, it is clear that sexually oriented material is disfavored and that the purpose of the ordinance, as represented by the findings

adopted with the ordinance, is to protect the public from exposure to "adult" materials, even though they can only be viewed behind closed doors by an adult audience. With respect to the second question, Appellees submit that it is equally clear that the remaining market; i.e. the 520 acres, is not viable or adequate, and thus not ample. Additionally, the 520 acres is so remotely located that the quality of communication is burdened; i.e. a distributor's message will reach fewer people and persons seeking the message will have more difficulty finding it.

In resolving this issue, the Court must avoid mechanically applying percentages of land area or other equally rigid and insensitive tools. Because of the variety of "geographic configurations and types of commerce among neighboring communities," these issues must be resolved "on a case-by-case basis" giving deference to the sensitive First Amendment concerns. *Schad*, 452 U.S. at 78 (Blackmun, J., concurring). Any such rule must focus on "the effect of [the] ordinance upon freedom of expression." *Young*, 427 U.S. at 78 (Powell, J., concurring). Courts must be alert to the possibility of cities using the zoning power as a pretext for suppressing expression. *Id.* at 84.

The effect of Renton's ordinance is to close the door to the marketplace for adult theatres. It is not narrowly drawn to deal with the "secondary effects" of a single "adult" theatre by the least intrusive means. The locational restrictions of the ordinance are designed to dissuade all but the most venturesome from opening an "adult" theatre and all but the most determined patrons from seeking out such a theatre in order to satisfy their appetites for the materials offered. Consequently, the

ordinance imposes a substantial burden on access to the marketplace and is thus void as violative of the First Amendment.

IV. ISSUES NOT REACHED BY THE COURT OF APPEALS MANDATE AFFIRMANCE.

In addition to the reasons given by the Court of Appeals, adequate, other grounds exist to sustain a finding that Renton's ordinance is unconstitutional.

1. Applying The "Strict Scrutiny" Test, Renton's Ordinance Is Violative Of The Equal Protection Guarantees Of The Fourteenth Amendment

This ordinance impermissibly distinguishes between sexually explicit material presented in the format of a motion picture theatre, and sexually explicit material presented in the form of video tapes, burlesque theatres, and adult book and picture magazine stores, without any showing that the former is clearly more disruptive than the latter. See *Carey v. Brown*, 447 U.S. 445, 460 (1980). There, the Court said:

When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized. *Police Department of Chicago v. Mosley*, 408 U.S., at 98-99, 101; see *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968); *William v. Rhodes*, 393 U.S. 23, 30-31 (1968); *Dunn v. Blumstein*, 405 U.S. 330, 342-343 (1972); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 34, n.75 (1973). 447 U.S. at 461-62.

Here, under the guise of protecting children from exposure to adult materials, preserving land values, facilitating the ministry of churches and protecting the image of the

community from the location of "adult entertainment land uses," the city has selectively excluded adult motion picture theatres from the general commercial marketplace of Renton, even though it permits other adult entertainment land uses which are equally or more likely to intrude on the values it seeks to protect.

Renton asserts that the ordinance in question here is aimed at eliminating the alleged secondary effects of an adult theatre upon surrounding business communities and neighborhoods. Assuming such a purpose, the ordinance is under-inclusive and, therefore, violative of the equal protection clause of the Fourteenth Amendment for singling out only adult theatres when no specific adverse operational characteristics of such a theatre, as opposed to other forms of adult businesses, have been identified. The City cannot, consistent with the principles of the equal protection clause, fail to include within the scope of its ordinance video tape stores which sell and rent video tapes of the same movies which are exhibited on the screen at the Appellees' theatre. What justification can be offered to support a regulation which allows a particular titled film to be sold or rented at a store in downtown Renton when, at the same time, the same movie cannot be shown in a theatre located next door?

Appellees' motion picture theatre is similar in all respects to most general audience motion picture theatres throughout the United States. When patrons leave the theatre, they take with them nothing but their memory of the visual presentation. On the other hand, video tape stores in Renton, not subject to the restrictions of this ordinance, sell and rent video tapes of the same films exhibited at Appellees' theatre. Unlike a theatre patron, the patron of a video tape store takes the movie of his

choice away with him. From there, the movie may be introduced into the privacy of the home and may become readily and easily accessible to the very persons Renton seeks to protect from these materials.

Adult bookstores are similarly not covered by the restrictions of this ordinance. They sell graphic sexual material. Once again, the material leaves the premises and potentially becomes physically available to children and others who may inadvertently find it.

Video stores selling and renting sexually explicit video tapes and adult bookstores selling sexually explicit magazines and books are as much "adult entertainment land uses" as a motion picture theatre exhibiting sexually explicit films to an adult audience. This being so, the under-inclusiveness of the ordinance's restrictions would seem largely to undermine Renton's claim that the prohibition of only motion picture theatres from certain areas can be justified by the asserted state interests. *Carey v. Brown*, 447 U.S. at 465. See *Schad*, 452 U.S. at 79 (Powell, J., concurring). There is nothing in the record to suggest that there is something inherent in a motion picture theatre's operational characteristics that would make it more disruptive of the values the city seeks to protect than adult bookstores or video tape stores. In the context of free expression, the mode of expression is as entitled to protection as the expression itself. *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Griswold v. State of Connecticut*, 391 U.S. 479 (1965); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Lovell v. City of Griffin*, 403 U.S. 444 (1938).

Absent a definitive showing that there is some operational characteristic of an adult theatre that is not involved in the operational characteristics of the adult video

store or adult bookstore, the classification is arbitrary, discriminatory and clearly unjustifiable. *Schad*, 452 U.S. at 71, is enlightening on this point. At footnote 10 of the opinion, Justice White writing for the majority, said:

... He [Justice Powell] did not suggest that a municipality could validly exclude theatres from its commercial zones if it included other businesses presenting similar problems.

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), states a standard by which equal protection requirements in the First Amendment context must be measured. The Court in that case identified the "Crucial question" as "whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Id.* at 95. The question here is whether Renton has a substantial interest in differentiating between a motion picture theatre presenting sexually explicit films to an adult audience and other adult entertainment land uses which are not subject to the same locational restrictions.⁵⁰

No justification for this differential treatment has been offered and none exists in the record. While Renton may assert that the primary purpose of this ordinance is to maintain the residential character of its community, the

50. In *City of Cleburne v. Cleburne Living Center*, — U.S. —, — S.Ct. — (1985), this Court invalidated, as applied, a zoning ordinance under which a group home for the mentally retarded was denied a special permit under the least demanding standard of equal protection review; i.e., "rationally related to a legitimate state interest." Reviewing the legislative history, this Court found that the ordinance was premised upon negative attitudes, fear and unsubstantiated factors, reasons insufficient for equal protection purposes for differential treatment. Other expressed concerns failed, in a similar manner, to justify differential treatment from other uses posing similar problems. In the instant case, the record below is equally as empty of reasons which would justify singling out adult theatres for locational restrictions while imposing no such restrictions on other similar uses.

broad restriction of banning adult theatres to the undeveloped industrial areas cannot be justified where the city has only selectively limited the commercial activity it finds objectionable. Renton's ordinance is not carefully drawn and "it is sufficiently over-inclusive and under-inclusive that any argument about the need to maintain the residential nature of this community fails as a justification." *Schad*, 452 U.S. at 79 (Powell, J., concurring). Renton's ordinance simply does not advance its asserted objectives in a manner consistent with the command of the equal protection clause. *Carey v. Brown*, 447 U.S. at 471. Accordingly, it must be found unconstitutional.

2. The Ordinance Is Unconstitutionally Vague

Appellants erroneously assert that the vagueness of Renton's ordinance is not at issue here.⁵¹ The vagueness of Renton's ordinance is very much at issue.⁵² An understanding of the issue is useful to understanding the restrictive and over broad reach of this ordinance.

Appellees, if the ordinance is upheld, must, of course, conform their motion picture exhibitions to the dictates of the ordinance. The ordinance, however, does not prohibit the exhibition of sexually explicit material in particular locations; rather, it prohibits the exhibition of such material as "a continuing course of conduct . . . in a manner which appeals to a prurient interest." (App. 96a). Determining what is a "continuing course of conduct" and "in a manner which appeals to a prurient interest" makes the ordinance unconstitutionally vague.

51. Appellants' Brief at 18.

52. App. 21a. At footnote 19 to its opinion, the Court of Appeals said, "In view of our holding, we need not address the overbreadth or vagueness issues raised by Playtime."

The ordinance defines "used" in the following way: "*Used*" The word "used" in the definition of "Adult Motion Picture Theatre" herein, describes a continuing course of conduct of exhibiting "specific sexual activities" and "specific anatomical area (sic) in a manner which appeals to a prurient interest.

In the setting of Appellees' business, how can Appellees be expected to know what those enforcing the ordinance will deem constitutes a "continuing course of conduct"? What does "in a manner which appeals to a prurient interest" mean? The confusion created by the vagueness of these phrases is dramatically exhibited by the testimony of the Planning Director, the responsible official of the City of Renton charged with enforcement of the ordinance. When asked what percentage of a theatre's film fare would have to be of the defined type, in a six-month period of operation, before a theatre would be an "adult" motion picture theater, the Planning Director responded, "over half."⁵³ He went on to indicate that alternating weeks of general and adult fare would not necessarily be violative of the ordinance.⁵⁴ However, at the same time, the matter could be referred to the City Council for their determination because they have the ultimate authority to make the decision.⁵⁵ In other words, the City Council is vested with unfettered discretionary authority to determine what "continuous course of conduct" means since the ordinance is silent with respect to a definition. There are no objective standards upon which the Council's determination rests. Additionally, the Planning Director makes clear that "half of the time" does not mean "half of the time"; rather, it means what he or the council chooses it to

53. Appendix B to Brief at App. 9-10. This material is found in the record as Appendix D to Appellants' Opening Brief filed in the Court of Appeals in Cause No. 83-3805.

54. *Id.* at App. 10-11.

55. *Id.* at App. 11-12.

mean.⁵⁶ He indicated that a program consisting of one hundred minutes of general release film fare and sixty minutes of adult film fare would be violative of the ordinance, even though less than half of the films, both in number and duration, constituted films subject to the regulations of the ordinance.⁵⁷

The meaning of "in a manner which appeals to a prurient interest" is similarly vague. In the context of the definition of "used," where these words appear, does this language modify the manner of exhibition? In other words, is it the manner of presentation and/or advertising that become the operative criteria for evaluation? Syntactically, this would seem to be the meaning. The city's answers to interrogatories highlights the uncertainty one is faced with in attempting to determine the meaning of these words. The city states that application of its ordinance does not turn on whether Appellees exhibit motion pictures.⁵⁸ Since all Appellees do is exhibit motion pictures, arguably the ordinance, as interpreted by the city, does not apply to Appellees at all. Another interrogatory required Renton to state the facts it would rely on to prove that motion pictures were exhibited "in a manner which appeals to a prurient interest." Renton's answer suggests that its ordinance is violated if sexually graphic matter is exhibited and it is advertised so as to appeal to the *erotic* interest of customers.⁵⁹ This response appears to suggest that the exhibition of sexually explicit graphic

56. *Id.*

57. *Id.* at App. 12.

58. Appendix C to Brief at App. 14, Interrogatory No. 1. This material is found in the record as Appendix E to "Appellants' Opening Brief filed in the Court of Appeals in Cause No. 83-3805.

59. *Id.*, Interrogatory No. 2.

matter, of any nature, is permitted so long as the advertising of the business does not appeal to the erotic interest of its customers. In answer to another interrogatory, Renton clearly states that the movies are not the issue.⁶⁰ If the movies are not the issue, what does this ordinance deal with? What type of exhibition is prohibited? How is it that one violates the mandate of the ordinance if the motion pictures themselves are not the primary determinative factor of whether they "appeal to a prurient interest"?

Part of the definition of "used" includes a portion of the test for determining whether press materials are obscene within the penumbra of the First Amendment. See *Miller v. California*, 413 U.S. 15, 24. See also, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. — (1985). Although Renton's ordinance requires proof of an appeal to the "prurient interest," that term is nowhere defined in the ordinance. However, the city, speaking authoritatively through its Planning Director, defines prurient in terms of "lewdness" and "unwholesome." Lewd, as defined by the Planning Director, means *depiction* of sexual acts or nudity and violence. "Unwholesome" involves a determination of whether the activities are ones which *the community* expressed as being of concern to them as the city was developing the ordinance in question here.⁶¹

The dilemma faced by Appellee in attempting to conform their exhibitions to the ordinance is immediately apparent. If, as part of their film fare, they exhibit sexually-oriented visual media, the City of Renton may conclude,

60. *Id.* at App. 15, Interrogatory No. 3.

61. Appendix B to Brief at App. 4-8. These definitions are certainly much broader than permitted in *Brockett v. Spokane Arcades, Inc.*, *supra*, where this Court held that "prurient interest" meant "shameful or morbid" and could not be equated with "lust" and a normal healthy interest in sex.

based upon uncertain standards, that they are doing so as a "continuing course of conduct," or by using an impermissibly vague and overbroad definition, that they are doing so in a manner that "appeals to a prurient interest."

The section of Ordinance No. 3637 that defines "used" is clearly "void for vagueness." It does not provide:

. . . sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. (Citations omitted). Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolendar v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855 (1983).

The definitions involved here have a substantial impact on First Amendment expression and are subject to the strictest review because the ordinance authorizes the abatement and closing of a theatre exhibiting constitutionally protected materials. Additionally, the very vagueness of the meaning Renton attaches to the operative phrases will necessarily result in nonjudicial self-censorship of nonobscene works because the line separating continuous from noncontinuous and prurient from nonprurient is left to the standardless, discretionary determinations of the Renton City Council and its Planning Director. For these reasons, Renton's ordinance is unconstitutionally vague.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

/s/ JACK R. BURNS*
Burns & Hammerly, P.S.

*Counsel of Record

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APPENDIX A

CITY MANAGER
(509) 515-3404
Sean 726-3404

City
of
PASCO

P.O. Box 293 412 West Clark Pasco, Washington 99301

June 9, 1980

Mr. Erling Mork
City Manager
930 Tacoma Avenue, S.
Tacoma, Washington 98402

Dear Erling:

This is just a note to tell you that the City administration here — Council and Staff — have worked with Roger Forbes of the Playtime Theaters, Inc. and with Jack Burns, his attorney.

Mr. Forbes took over an old run-down theater here in Pasco and began to operate it as an adult theater. All this began about three years ago, a year or so before I joined the City team. As in your city, this new operation caused a "knee jerk" reaction here, too. There was a hue and a cry, so they tell me, about the alleged effect of showing adult films.

The City retroactively tried to zone the operation out of existence and wound up in Federal District Court in Spokane, where the matter languished on the docket for many months. The City meanwhile was trying to decide how to get a war chest together to continue the battle in the courts.

While all of this was happening, the adult theater was gaining acceptance and the die-hard moralists began to fade out of the picture. People were going to the theater and Forbes was making money on the operation. About this time, the City Council changed its attitude about the

Theater and decided to dismiss some pending local obscenity charges, Forbes agreed to dismiss the suit, and in return for the receipt of a non-conforming use permit, agreed to substantially modernize the building, a project that is now well underway.

In all of this, we have found Mr. Forbes to be an open and above-board businessman. His adult theater (the only one in town) has not ruined adjoining businesses, and from what I can gather from my city hall vantage point, people around here have accepted the Theater and now have very little adverse to say about it. As a matter of fact, I have not had a single complaint about the operation in about a year.

I am not a proponent of adult theaters, nor is our Council. We are neither for or against them. We simply take the view that people do go to adult film theaters and that it is their right to do so. Others that do not care for this type of film fare are not required to enter the premises. The remodeling which will draw to completion soon will create an unostentatious facade which should not infringe on the sensibilities of either crowd — those that go to see adult films and the others that do not.

Although originally very nervous about this operation, our Council now seems very cool about the whole thing, and so far as downtown Pasco is concerned, accepts Roger Forbes as just another businessman who is making a substantial capital outlay to remove what was before a real eyesore.

Best wishes.

Sincerely,
/s/ LEE F. KRAFT
Leland F. Kraft
City Manager

APPENDIX B

(p. 41) Q. Last weekend. And would you tell us in viewing the film, in what way did the movie "Deep Throat" appeal to your prurient interest, as you perceive — appeal to your prurient interest as you perceive it?

A. The — well, my definition of prurient interest is gleaned from Webster's which speaks basically to lewdness or, I can't think of the second one.

Q. Lascivious?

A. Nope. That's not the one I'm thinking of. It is on my tongue. Unwholesome.

Q. Okay. When did you look at Webster's dictionary to ascertain their meaning?

A. Since the time of the film — actually having reviewed the film.

Q. Since last weekend.

A. Yes. —

Q. Did you look at it today?

A. Yes.

Q. Did you look at it after the hour of 11:30 today?

A. Yes.

Q. Did you do that in the company or at the request of your attorneys?

MR. BARBER: Objection. It is a privileged (p. 42) matter.

MR. SMITH: Are you telling him not to answer?

MR. BARBER: Let's see.

(Discussion off the record)

MR. BARBER: We won't waive the objection, but go ahead and answer.

A. Yes.

BY MR. SMITH:

Q. Which is it, at the request of your attorneys or in their company?

MR. BARBER: Same objection.

A. I don't recall which it was.

BY MR. SMITH:

Q. As I look at this Ordinance and assuming that I — let's assume that I wanted to know where — how the City Council defined "prurient," would you point to me in the Ordinance, either the first or second Ordinance for 1982, where the word "prurient interest" is defined, if at all?

A. I don't believe that's defined in the Ordinance.

Q. How would one, as you perceive it, as a representative of the City of Renton and Director of Policy, how would you deal with someone who came in and said "what is it you mean by prurient," would you (p. 43) point them to a dictionary, point them to law book, send them to the City Attorneys Office, what would you do?

A. Certainly start with a dictionary, that would be a standard practice.

Q. And is that a standard practice that you would follow in generally areas of perhaps ambiguous definitions —

A. Yes.

Q. And it is then your perception the dictionary definition of prurient is the definition you, as the Director of Policy, would apply in ascertaining whether a proposed use would be an adult motion picture theater?

A. Yes.

Q. All right. Now, how then, would you tell us now, utilizing your definition that you say you got from Webster's — and, by the way, which Webster's and what edition?

A. New Collegiate.

Q. New Collegiate. Was it the 12th edition or —

A. I have no idea.

Q. You didn't go to the big Webster's dictionary or one that's the 3rd or 4th edition that's about 3,000 pages big?

(p. 44) A. No.

Q. Talking about the —

A. It is—

Q. — smaller one about —

A. Three inches.

Q. Okay.

A. In thickness. That's the standard document in our library.

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Q. Then tell me how did you, using "Deep Throat," with the movie that you have had at least two exposures to, how is that — how would that be prurient as you perceived under the operational definition you have applied of lewdness or unwholesome?

A. The majority of the film exhibits or depicts activities which I would, first of all, defined as pornographic as we discussed earlier, and by their content would come under the category of being lewd or unwholesome.

Q. What is it you understand as meant by "lewd"?

A. I suppose that my working definition would be that it is essentially that which I visualize as being pornographic.

Q. Well, and pornographic is that which you visualize as depicting sexual acts or nudity, correct?

A. And including violence.

(p. 45) Q. Well, you said violence was not a component of it.

A. No.

Q. I asked you whether there was any difference between your perception of sexual acts with or without violence, do you remember that discussion, and you said there was none?

A. No. My recollection was that I stated that you didn't — that use of sex in a violent manner was an additional component.

Q. And then — you indeed said that. But then I asked you, did I not, by your definition of pornographic material and the delineation of sex acts, wouldn't that be the same

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whether there was violence included or not included, you would consider it all pornographic?

A. I guess in my own mind, I see some distinction between the three: nudity, sexual contact and violent — sexual content in a violent fashion as being three separate items. The two may be together, but I visualize them as a third component.

Q. And your working definition of "lewd" is that which you visualize as pornographic; is that correct?

A. Yes.

Q. And "pornographic" is that which involves nudity or (p. 46) some sex act, be it violent or nonviolent, correct?

A. Yes.

Q. Now, taking the definition of the concept of the word used, do you see there where it says "exhibiting specific sexual activities and specified anatomical areas" — "area," do you see that?

A. Yes.

Q. And isn't that as I understand it, what you have visualized as being pornographic, i.e., nudity and/or sexual acts; is that correct?

A. Yes.

Q. Now, if material which shows specific sexual activities and specific anatomical areas by your working definition is lewd, ergo it is also prurient; is that correct?

A. I don't — I'm not sure that I would make that explicit a connection.

Q. No pun intended on "explicit," of course. All right. Well, as I followed your rationale, you defined lewdness as that working definition as you visualize depict nudity or sex acts, correct?

A. Yes.

Q. All right. And in the Ordinance, you have defined specific sexual activity and specified anatomical areas, correct?

(p. 47) A. Yes.

Q. And those would include the two components of nudity and sexual acts, would they not?

A. Yes.

Q. Ergo, anything with which has nudity or sexual acts would be lewd, ergo, be prurient, is that not correct, by the definition you have just given us?

A. I think it is important to connect both the concept of lewdness and unwholesomeness to meet my full definition of what prurient would be.

Q. You hadn't given us that on your working definition of lewdness, that's another component you are adding now; is that correct?

A. I'm not sure that I am adding it, but it certainly is a consideration.

Q. By your definition, then something can be lewd but not per se be unwholesome; is that what you're saying?

MR. BARBER: I want to object just to the form of the question. Becoming confusing. I think we are just delving into semantics, but go ahead and answer.

BY MR. SMITH:

Q. If you say you had to add unwholesome to the lewdness to get the full impact of your definition, then by

* * *

(p. 58) the connection of the story — story line.

Q. Let me ask you. Does the story line play no part of determination of whether it is an adult film or nonadult film as we have been using that term here today?

A. It certainly plays a part, yes.

Q. Plays a part?

A. Yes.

Q. Okay. Whether the part it plays is dependent on how solid the story line is; is that what you are suggesting?

A. As well as its content.

Q. As well as its content. All right. Now, suppose our hypothetical John Doe who wanted to ascertain whether or not this Roxy Theater he is about to rent would be required to be classified as an adult theater, and if so, then he couldn't obviously operate it at that location by your concerns and standards. Suppose he said, "Okay, I'm going to show some movies of the type that you have described, going to show specific sexual activities and of a type that might not be approved of by the majority of the citizens of the City of Renton. In a six-month period of time of operation, how many — what percentage of the film fare would have to be of that type before you would

(p. 59) consider me to be an adult motion picture theater?" what would you tell him?

A. Without thinking about it for a long, long time, would certainly think over half.

Q. Over half. Now, if he is open one week and shows one film and that film is of the category you described or we hypothetically chatted about here, where there was specific sexual activity of the type that was — would be disapproved of by a majority of the citizens of Renton, would that one week, one single showing of one film make it an adult motion picture theater as you perceive it under the Ordinance?

A. Not if — I would think not if weeks prior and weeks subsequent contained general fare —

Q. Only — that was the first and only film that was shown in one week, during that week it would be an adult motion picture theater because it was the only film; is that correct?

A. I think this crucial aspect is continuing course of conduct.

Q. How long must the conduct continue, as you read and understand the Ordinance, before the regular showing of such film fare would raise the theater to the level of an adult motion picture theater as defined — as you would understand defined under the Ordinance?

(p. 60) MR. BARBER: I object to that. I think it's been asked and answered.

MR. SMITH: I don't think so. I don't remember.

MR. BURNS: No.

(Discussion off the record)

BY MR. SMITH:

Q. After consultation with your attorney, do you have an answer?

A. The — I would think that if we were talking about alternating weeks of general fare and adult theater fare, that it would be raised before the City Council. Ultimately has the authority to make the determination as to whether to proceed with injunctive relief.

Q. But is there anything as you read the Ordinance that tells us that in advance, anything that speaks to alternating weeks? Is there anything that would tell me in advance whether I would be classified as an adult motion picture theater?

A. As I indicated earlier, I would say half the time, exceeding half the time would be my definition of that.

Q. The question is is there anything in the Ordinance that tells me that without reference to your (p. 61) perception, would you look at the Ordinance again, anything in the Ordinance that tells me that?

A. I would think that the layman's understanding of continuing course of conduct would be most of the time.

Q. Most of the time.

A. Or exceeding half of the time.

Q. Exceeding half of the time. But in the instance of alternating 50/50, which does not exceed half of the time, you would say that this would then be, as you understand it, called to the City Council's attention for their determination whether or not to proceed to close the place down as a public nuisance; is that correct?

A. Yes.

Q. So could be less than — that could be — that could be at least 50 percent or less of the time, correct?

A. Obviously depending on which week it was under consideration it might be 49 or 51 percent.

Q. I understand. But yet there is nothing within the definitional standard set forth in the Ordinance that would tell us that in advance, is there?

A. Only to the extent that I think most people would understand in the terms of continuing course of conduct.

(p. 62) Q. How about the concept of — suppose I said, “sir, I don’t want to offend your law and I don’t want to spend a lot of money opening the Roxy Theater. If I am going to be classified as an adult film theater because then I can’t operate, so I will tell you what I am going to do. Show one adult film, followed by one general release film, followed by one Mickey Mouse cartoon. I will show three films and this will take a total of three and a half hours to show and the general release film would be 90 minutes, adult film 60 minutes and Mickey Mouse will be ten minutes. Am I an adult theater?”

A. I would think that it would be. Under the definition that’s in the Ordinance of continuing course of conduct, that that same film fare was being shown week in, week out, continuously.

Q. Even though it constituted 60 minutes vs. 100 minutes of nonadult film fare; is that correct?

A. Yes.

Q. So it is the repetition of showing one film, even though it may be less than 50 percent of the total program,

that you in your mind would trigger the operation of the Ordinance and thus make our hypothetical theater an adult theater?

A. The ultimate decision is not mine.

(p. 63) Q. I understand. But—

A. But the point where adult film fare was being shown every day, continuously, even though it is interspersed, the matter would be brought to the City Council for their review and decision.

Q. Well, if the important decision is not yours, why are you looking at all these adult films now?

MR. BARBER: I object. That’s argumentative.

MR. SMITH: It is not argumentative. We think it is a question of if he is now abdicating the responsibility for making any important decisions on the issue, why is he looking at the adult films?

MR. BARBER: It is an argumentative question. You can answer, if you can.

A. Someone has to make the quantitative analysis of the content of the films for presentation to the Council. It fell to me.

BY MR. SMITH:

Q. And when do you make that presentation?

A. I’m not sure when it is going to occur, as a result of this particular litigation, but if we were not speaking in terms of this litigation, it would probably occur after some reasonable period of time has elapsed and continuing course of action on the

APPENDIX C

INTERROGATORY NO. 1: Do the Plaintiffs contend that the motion pictures exhibited at the Renton Theatre since January 20, 1983 are exhibited in a manner which appeals to a prurient interest.

ANSWER: Plaintiff's contention as to the cause of action which is being tried herein (Ordinance No. 3526, as amended) is that Defendants, at the Renton Theater, since January 20, 1983 have been engaged in a continuous course of conduct of *exhibiting "specified sexual activities" and "specified anatomical areas"* (as distinguished from "motion picture") *in a manner which appeals to a prurient interest.* Answer to Interrogatory No. 2 and 3 further explain answer to 1.

INTERROGATORY NO. 2: If your answer to the foregoing Interrogatory is in the affirmative, state each and every fact, or contention (factual or legal) upon which the Plaintiffs will rely to prove that the motion pictures were exhibited in a manner which appeals to a prurient interest.

ANSWER: Advertisements of films in newspapers, on the theater marquee and in the previews of films to be exhibited in the future at the Renton Theater. The actual "specified sexual activities" and "specified anatomical areas" depicted in the motion picture films themselves. The continuous exhibition of adult film fare at the Renton Theater which tends to advertise the availability of sexually explicit material to be exhibited in the future at the Renton Theater. The foregoing facts establish that the Renton Theater is being used as a business to purvey sexually explicit graphic matter which is openly advertised to appeal to the erotic interest of its customers, or the unhealthy or unwholesome interest in erotic material.

INTERROGATORY NO. 3: Do the Plaintiffs contend that the motion pictures exhibited at the Renton Theatre since January 20, 1983 appeal to a prurient interest?

ANSWER: Yes. For purposes of the proceedings before the court, the Plaintiffs contend that the question of whether the motion pictures themselves appeal to a prurient interest is not the issue. Rather, the issue is whether the manner in which the "specified sexual activities" and "specified anatomical areas" are exhibited at the Renton Theater is a continuing course of conduct of appealing to a prurient interest.

OCT 25 1985

JOSEPH F. SPANIOLO, JR.
CLERK

No. 84-1360

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE CITY OF RENTON, *et al.*,
v. *Appellants*,

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF OF APPELLANTS

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TABLE OF AUTHORITIES

Cases:

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| <i>Doran v. Salem Inn, Inc.</i> , 422 U.S. 922 (1975) | 4 |
| <i>Erznoznik v. City of Jacksonville</i> , 442 U.S. 205 (1975) | 9 |
| <i>FCC v. Pacifica Foundation</i> , 438 U.S. 726 (1978) | 8 |
| <i>Globe Newspapers Co. v. Superior Court</i> , 457 U.S. 596 (1982) | 8, 9 |
| <i>Larkin v. Grendel's Den, Inc.</i> , 459 U.S. 116 (1982) .. | 9 |
| <i>Linmark Associates, Inc. v. Willingboro</i> , 431 U.S. 85 (1977) | 9 |
| <i>Members of the City Council v. Taxpayers for Vincent</i> , 104 S.Ct. 2118 (1984) | 8, 11, 12 |
| <i>Mt. Healthy City School District v. Doyle</i> , 429 U.S. 274 (1977) | 10, 11 |
| <i>New Orleans v. Dukes</i> , 427 U.S. 297 (1976) | 4 |
| <i>New York v. Ferber</i> , 458 U.S. 747 (1982) | 9 |
| <i>Northend Cinema, Inc. v. City of Seattle</i> , 90 Wash. 2d 709, 585 P.2d 1153, 1155 (1978), cert. denied sub nom. <i>Apple Theatre, Inc. v. City of Seattle</i> , 441 U.S. 946 (1979) | 4, 9 |
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| <i>Penn Central Transportation Co. v. New York City</i> , 438 U.S. 104 (1978) | 9 |
| <i>Playtime Theatres, Inc. v. City of Tacoma</i> , No. C80-523T (W.D. Wash. Sept. 2, 1981), aff'd, 694 F.2d 723 (9th Cir. 1982) (unpublished opinion) | 2 |

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| <i>Smith v. United States</i> , 431 U.S. 291 (1977) | 9 |
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| <i>Young v. American Mini Theatres</i> , 427 U.S. 50 (1976) | 4, 5, 7, 8, 11, 12, 13 |

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REPLY BRIEF

1. Our opening brief set forth in detail the background of the Ordinance at issue here, including the documented concern about the effects of adult theatres on residential neighborhoods, parks, schools, and churches. Although Appellees (hereinafter "Playtime") have offered their own version of that history, their account contains, and even depends on, a number of factual errors. A few examples will suffice.

To begin with, it is inaccurate to imply, as Playtime does, that a "public outcry" over an adult business in Renton was "[t]he genesis of the ordinance." Playtime Br. 1 (emphasis in original); *see also id.* at 12. As the record makes clear (JA 411), Renton's Mayor, in a memorandum to the Council President, noted a public outcry in *other cities*, where the secondary effects of adult theatres were already well known, and expressed concern that a similar reaction might occur in Renton if and when adult theatres moved into the City.

Playtime also seeks to convey the impression that the Ordinance was passed without study¹ and after approximately "five (5) minutes consideration." Playtime Br. 3. The impression is simply incorrect. The testimony of the City's Policy Planning Director and numerous documents established that this entire problem was extensively studied for almost a year.² Furthermore, while it is literally accurate that the vote on the Ordinance took only a short time, Playtime ignores the facts that this was the second reading of the Ordinance (JA 134-135) and that the Council acts only after receiving advice from several committees that report directly to it. These committees had already conducted numerous public meetings, had taken testimony, and had studied relevant documents.³ The most important committee, the Planning and Development Committee, is entirely made up of City Council members. Passage of the Ordinance, therefore, was anything but an offhand event.

2. Turning to the legal issues, Playtime suggests that the Court need not reach the constitutional questions in this case because the Court of Appeals has remanded to the District Court for a finding on the issue of mo-

¹ See Playtime Br. 1 ("no documented study"); *id.* at 2 ("undocumented, unstudied, and speculative perception"); *id.* at 5 (City "did nothing to study the effects of adult businesses") (emphasis in original); *id.* at 7 ("little, if anything, was studied by the Planning Department").

² *E.g.*, JA 27-29, 32-33, 47, 70-75, 107-110, 129-130, 132-133, 167-168, 170, 172-174, 185-186, 190, 195-198.

The Tacoma City Council looked at less than the Renton City Council did, and yet its ordinance, similar in many respects to Renton's, was upheld by both the Federal District Court and the Ninth Circuit. *Playtime Theatres, Inc. v. City of Tacoma*, No. C80-523T (W.D. Wash. Sept. 2, 1981), *aff'd*, 694 F.2d 723 (9th Cir. 1982) (unpublished opinion). Moreover, the Ninth Circuit there held that the record showed that Playtime's theatres "contributed to neighborhood deterioration." Slip op. at 3.

³ *E.g.*, JA 27-29, 35, 47, 73-76, 128, 130-135, 178-179, 198.

tive. Playtime Br. 10-14. This argument is defective for several reasons.

First, it is not at all clear that the Court of Appeals has remanded for the reason stated by Playtime.⁴ But even assuming that Playtime is correct, there is simply nothing further to be done, even under Playtime's own formulation, in regard to the issue of motivation. Playtime concedes that the Ninth Circuit will not allow the individual members of the City Council to be deposed as to their intent or motives. Playtime Br. 12 n. 15. There is no writing, film, tape, or other record of precisely what occurred at the various committee meetings other than what is already in evidence. See *id.* at 5, 12 n. 14, 23. And the only person to attend virtually all of these meetings, Mr. Clemens, has already testified to the extent of his knowledge and recollection.⁵ There is simply nothing more to be said; the record is complete.

The District Court has certainly said all it could say on this subject. It specifically addressed the issue of intent (JS App 29a) and held that Renton's "governmental interest is unrelated to the suppression of free expression." *Id.* at 31a. Even though some citizens had expressed what "might be" impermissible views, these statements did not negate "the legitimate, predominate concerns of the City Council * * *." *Id.* This is, in effect, precisely the finding that the Ninth Circuit thought was necessary—namely, that this Ordinance would have been passed regardless of an arguably impermissible motive.

⁴ The Court of Appeals made a point of the fact that the case was properly submitted for summary judgment on the basis of the record as it existed before the District Court. Jurisdictional Statement Appendix (hereinafter "JS App") 15a n.12. After ruling that the appropriate test was whether "a motivating factor" of the City Council was to restrict Playtime's First Amendment rights, the court held that Renton had "failed to sustain its burden of justifying its ordinance," and therefore reversed and remanded "for proceedings consistent with this opinion". JS App 20a, 22a.

⁵ See his affidavits and testimony, for example, beginning at JA 25, 56, 103, 164 and 248.

It is hard to know what else the District Court could possibly find on remand.

The basic point, however, is that there should be no necessity to look into motive at all. Once the Court has determined, as it should, that a substantial governmental interest is being advanced by Renton and that any restrictions on First Amendment rights are entirely incidental, motive is simply not a factor. That was the approach taken in *Young v. American Mini Theatres*, 427 U.S. 50 (1976). In any event, the intent of the City Council, if relevant at all, is set forth in its specific findings in support of its Ordinance. JS App 81a-86a.⁶

In sum, the constitutional issues as they relate to motivation not only need no further clarification but cannot be clarified further. The case squarely poses, in its present posture, the issues presented by the Jurisdictional Statement.⁷

3. It simply is not true, as Playtime and the *amici* contend, that no study has focused on the effect of a single theatre in a given area. Seattle, for example, studied the effect of the Apple Theatre in the First Hill residential community of that city.⁸

Moreover, both Playtime and an *amicus* supporting it repeatedly and incorrectly treat Renton's Ordinance as if

⁶ In fact, an entire argument of one *amicus* is based on the premise that the Court of Appeals went no further in its analysis than the reasons for the Ordinance articulated on its face. Brief of the Outdoor Advertising Ass'n of America, Inc., *et al.*, 10-11.

⁷ Of course, even if the case were in an interlocutory stage, that would not prevent the Court from deciding it. See generally *New Orleans v. Dukes*, 427 U.S. 297, 301 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 n.2 (1975); *City of El Paso v. Simmons*, 379 U.S. 497, 502-503 (1965); *Chicago v. Atchison, Topeka & Santa Fe R. Co.*, 357 U.S. 77, 82-83 (1958).

⁸ *Northend Cinema, Inc. v. City of Seattle*, 90 Wash. 2d 709, 585 P.2d 1153, 1155 (1978), *cert. denied sub nom. Apple Theatre, Inc. v. City of Seattle*, 441 U.S. 946 (1979). See also *Chulchian v. City of Indianapolis*, 633 F.2d 27, 29 (7th Cir. 1980) (10 arrests around a single adult theatre).

it were directed to the establishment of a *single* adult theatre in the City.⁹ This approach entirely misses the point of the Renton Ordinance, which was directed to adult theatres in general. Since Renton was zoning *in advance* of a problem, the thrust of its Ordinance obviously was going to be felt by the first adult theatre seeking to locate in the City (as well as every adult theatre entering thereafter). In this case, that first use happened to be Playtime. But the Ordinance was not directed at Playtime or any other first use; it was written and enacted to be applicable to *every* adult theatre that subsequently entered the City. Arguing that the Ordinance was directed only at the presence of a single adult theatre is like a drugstore contending that an ordinance which zones commercial enterprises away from residences is invalid because the first drugstore in a residential neighborhood cannot possibly cause harm.

4. The opposition briefs also focus on the fact that Detroit's City Council in *Young* required adult theatres to be dispersed, whereas the Renton City Council opted for a concentration approach to the same problem.¹⁰ But this is an attack on a uniquely legislative decision. If, for example, there is a crime problem around each adult theatre, a city may wish to deal with the problem as a unit, concentrating the city's scarce resources in a limited area rather than having to dissipate them in a number of different locations. Moreover, in a tightly-knit, small city

⁹ Playtime Br. 2, 3, 8 (incl. n.10), 16 n.18, 27-28 (incl. n.37), 31, 32, 33, 37-38, 40; Brief of American Booksellers Ass'n *et al.* (hereinafter "Booksellers Br.") 4-5, 9-10.

Playtime relies in part on a letter that is not a public document and is not a part of the record of this case or, so far as we are aware, of any other case. Playtime Br. 28 n.38, App. 1-2. The author of the letter has certainly never been examined on it.

¹⁰ *E.g.*, Playtime Br. 8, 16-17, 28-29; Booksellers Br. 12; ACLU Br. 38-39.

like Renton,¹¹ dispersing theatres simply does not solve the underlying problem of adverse secondary effects on residences, schools, and the like. Detroit was concerned, *inter alia*, about adult theatres being too close to each other. Renton does not care if they are close to each other so long as they are not near certain areas where the deterioration they will cause will have particularly pernicious effects on family and property values. Only by concentrating these theatres where Renton has put them can their proximity to homes, parks, churches and schools—and their deleterious effects—be avoided.

5. Neither Playtime nor the *amici* supporting it dispute the fact that 520 acres are available for the location of adult theatres—enough space for over 400 such theatres and more space than presently occupied by either commercial uses or multi-family residences. JA 26. Playtime and *amici* nevertheless argue that the property is constitutionally lacking. Their argument on “availability,” however, is based entirely on the affidavits and testimony of three people, all of whom used incorrect maps and therefore looked almost wholly at the wrong area. JA 217, 225, 230, 231, 233, 239-247, 293. Even so, as we have already demonstrated (Appellants’ Br. 31), these and other witnesses showed that part of the 520 acres is unoccupied, undeveloped or in the process of development, and some parts are even now for sale.¹² The District Court’s findings (JS App 28a) totally refute the notion that the set-aside zone is as pictured by Playtime and the *amici* supporting it.¹³

¹¹ In Renton, for example, homes immediately border the City’s business area. JA 42.

¹² The ACLU refers (p. 15) to testimony to the effect that the set-aside zone is dark at night. Subsequent to that testimony, however, the improvement plans referred to in the record (JA 257-258) have been carried out, roads have been widened and improved, and the zone is now well lit.

¹³ Playtime concedes that “a substantial part of the so called available land is occupied by,” among other things, “a fully-

Moreover, when the “availability” argument is viewed carefully, it becomes clear that what Playtime really seeks is not available property but an optimal flow of paying customers—the same kind of argument that was rejected in *Young*, 427 U.S. at 62-63 (plurality opinion), 78-79 (Powell, J., concurring).¹⁴ Playtime wants to be located where the most people already congregate, which will bring more customers into its theatres. But as the Point Roberts example in our primary Brief demonstrates (p. 34), an adult theatre draws customers from long distances, so that there is no need to be located at the epicenter of commerce. Here, the set-aside zone is only a short distance from downtown Renton. Moreover, Playtime would be making the same argument if *all* theatres, showing general release as well as adult fare, had been banned from Renton’s downtown area. The real effect of the ruling sought, therefore, would be that a city could not zone *theatres of any kind* away from residences, schools, and the like, even if there were reasonable access to them. Such a ruling would amount to an unprecedented intrusion by the judiciary into the legislative arena.

The question, properly stated, is whether Renton, recognizing the deleterious effects of a *particular kind* of business—in this case, adult theatres—has a right to prevent that business from locating where it will do the most harm.¹⁵ So long as there is easy access to the new loca-

developed shopping center” (Playtime Br. 34 n.45), and yet states at another part of its Brief that “there are no locations in a commercial area of the city” where adult theatres can locate. *Id.* at 28; *see also id.* at 38 n.49, 42.

¹⁴ Playtime Br. 35, 36, 38 n.49, 40, 42; *see also* Brief of the American Civil Liberties Union *et al.* (hereinafter “ACLU Br.”) 4, 13, 15; Booksellers Br. 4, 7, 8, 11.

¹⁵ Even the ACLU concedes that “there may be a legitimate interest in removing adult theatres from residential neighborhoods.” ACLU Br. 45. It also concedes that Renton’s “commercial areas are located in close proximity to residences.” *Id.*, citing JA 42.

tion—and even Playtime concedes that “the area comprising the 520 acres is adequately served by roads” (Playtime Br. 36)—it should not be constitutionally relevant whether many or few people normally congregate on the streets.¹⁶

6. Much of the discussion in the opposition briefs goes to the concept that a zoning ordinance must be content neutral.¹⁷ But that very issue has already been decided by *Young*.¹⁸ The Court there recognized that it is the show-

¹⁶ Playtime and amici continue to misrepresent the nature, content and quality of the 520 acres. Playtime Br. 34 n.45; ACLU Br. 13, 15. Perhaps amici do not know, but Playtime surely does, for example, that the racetrack and sewage disposal plant are not within the set-aside zone. After the preliminary injunction maps were corrected by Mr. Clemens, clearly showing that these facilities were outside the zone (JA 215), Playtime's counsel had an opportunity to question him about this but failed to do so. JA 263-276, 278-280.

¹⁷ E.g., Playtime Br. 8, 14-15, 19-20, 30; ACLU Br. 1-2; Booksellers Br. 11.

¹⁸ Perhaps recognizing this, Playtime asks that *Young* be reconsidered. Playtime Br. 14. The only reason given is that *Young* allegedly is inconsistent with *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980). But that case is inapposite for several reasons. The prohibition in *Consolidated Edison* was entirely related to content; there was nothing allegedly harmful about the inserts other than what they said, and nothing at all harmful about the distribution itself. *Id.* at 537. Here, the regulation relates to the secondary adverse effects brought about by adult theatres, not by the films in and of themselves. Moreover, *Consolidated Edison* itself distinguished the situation here. *Id.* at 538 n.5. The Court pointed out that content *can* be important and cited to language in *Young*, 427 U.S. at 70-71, and *FCC v. Pacifica Foundation*, 438 U.S. 726, 746-747 (1978), to the effect that some speech is entitled to less protection than others.

Young obviously has continuing vitality; it has been cited by the Court with apparent approval in a number of different contexts. See, e.g., *Members of the City Council v. Taxpayers for Vincent*, 104 S.Ct. 2118 (1984); *Globe Newspapers Co. v. Superior Court*,

ing of adult films in public theatres that draws a different type of clientele, generates parking and traffic problems, results in increased crime, causes property values to go down, and the like. This was precisely the experience in Detroit—and in Seattle¹⁹—that Renton was attempting to avoid. Renton seeks not to suppress films that are entitled to at least some protection but rather to minimize the natural and inevitable consequences of the operation of adult theatres—consequences that zoning laws are uniquely and precisely tailored to address.²⁰

7. The point is strenuously argued that the restrictions in Renton's Ordinance are greater than needed.²¹ First, as this Court has recently made clear,²² the judi-

457 U.S. 596, 607 n.17 (1982); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121 (1982); *New York v. Ferber*, 458 U.S. 747, 763 (1982); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 71-74 (1981); *Carey v. Brown*, 447 U.S. 455, 465 n.9 (1980); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. at 538 n.5; *Prune-Yard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 129 (1978); *Aboud v. Detroit Board of Education*, 431 U.S. 209, 231 n.28 (1977); *Smith v. United States*, 431 U.S. 291, 303 (1977); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 94 (1977).

¹⁹ As the Washington Supreme Court put it: “The concerns expressed [in Seattle] were very specific and included the attraction of transients, parking and traffic problems, increased crime, decreasing property values, and interference with parental responsibilities for children.” *Northend Cinema*, 585 P.2d at 1155.

²⁰ The ACLU wholly misperceives the nature of the evil posed by these theatres when it states that the reasons for the Ordinance “reflect only the notion that the outward appearance of an adult theatre is offensive to some people” (ACLU Br. 30) and that “people passing by the theatre * * * are subjected only to the message that adult films are shown inside.” *Id.* at 31 (emphasis in original). Renton is not concerned about appearances but about the deterioration of whole neighborhoods. Cf. *Erznoznik v. City of Jacksonville*, 442 U.S. 205 (1975).

²¹ Playtime Br. 9, 19-21, 26-30, 40; Bookseller Br. 7-8; ACLU Br. 4, 7-12.

²² *United States v. Albertini*, 105 S. Ct. 2897, 2907 (1985).

ciary should not be second-guessing legislative bodies as to whether they could have drawn a regulation more narrowly, or in some other fashion, so long as the regulation they did enact is within their constitutional powers. Renton was clearly carrying out its proper constitutional functions in zoning adult theatres, and the choices it made as to distances, concentration, etc., are entirely legislative in nature.²³ Second, even if the Court were to apply a "least-restrictive regulation" test, it is hard to imagine how Renton could have dealt with its particular problems any more narrowly than it did. On the one hand, adult theatres had to be located away from the areas they would most seriously affect, or the zoning would be useless. On the other hand, the restriction resulted in an area which is readily accessible and which would hold over 400 of such theatres. The Ordinance, then, effectively accomplishes its purposes and yet has only a minimal effect on the free expression of ideas.²⁴

8. The ACLU urges the Court to apply the "strict scrutiny" test of *Schad v. Borough of Mount Ephraim*, or the "motivating factor" test of *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977). ACLU Br. 19-34. It makes no difference which test, or any combination of them, is applied; Renton's Ordinance passes muster. Even if, for example, strict scrutiny were to be applied in an effort to find an improper motivating

²³ Playtime and *amici* cannot agree among themselves as to whether the rules relating to time, place and manner restrictions even apply to this case. Playtime argues that Renton's Ordinance is not a proper time, place and manner regulation (Playtime Br. 14-15), whereas the ACLU contends that the Ordinance should not be measured by time, place and manner standards at all. ACLU Br. 12 n.2.

²⁴ It is highly significant that when Playtime attempts to suggest a less restrictive regulation, all it can come up with is a prohibition against "pictorial advertising which could be viewed from the street by passersby" (Playtime Br. 26 n.34)—a solution that both misperceives the problem and fails to construct an answer to it.

factor, this Ordinance meets the test, for the reasons set forth in our main Brief. We would point out, however, that the *Schad* and *Mt. Healthy* cases are odd ones to rely upon, when *Young* so closely applies. *Schad* was a case where free expression was totally stilled with no alternative means of communication, and in *Mt. Healthy* an inquiry into motive was made only *after* it was first determined that First Amendment rights had apparently been violated.²⁵

What the ACLU and Playtime fail to understand is that this case involves the kind of incidental restrictions on speech that they attribute to *Young*, *Taxpayers for Vincent*, and *United States v. O'Brien*, 391 U.S. 367 (1968). Renton has not in any way attempted to regulate the content of adult films. This case involves only whether these films are to be shown in one part of town, where Playtime wants to be located, or in another part, where they will not cause adverse secondary effects.²⁶

9. Little need be said about Playtime's arguments that were not addressed by the Court of Appeals. The Equal Protection Clause does not require a city to enact a comprehensive land-use scheme in one action. Instead, a city can, and should, employ a more conservative, step-by-step approach, which allows a greater degree of flexibility. Renton has chosen to deal with adult theatres

²⁵ The ACLU takes a strange and contradictory position in regard to motive. It states, on the one hand, that the area in which adult theatres are being placed is an unsatisfactory one, which proves that the City had an improper motive, and then, in order to bolster an entirely different argument, it contends that Renton did not choose the area at all—that the area came about by chance when the City applied its 1000-foot restrictions. ACLU Br. 5-6, 13-16, 23-24, 32.

²⁶ Perhaps in recognition of the little support it derives from this Court's majority opinions, Playtime repeatedly cites to and relies upon concurring and dissenting opinions throughout its Brief. *E.g.*, Playtime Br. 19, 20, 21, 29-30, 31, 32, 39, 40, 43, 45.

first as one step in an on-going process, particularly since many of the adult uses cited by Playtime (Playtime Br. 10, 19 n.21, 26, 41) are not even in the City. JA 174. Moreover, there is no reason whatever why an adult theatre must be treated the same as a bar or a bookstore. As a matter of fact, by arguing that a video store that rents and sells adult movies requires the same treatment as an adult theatre (Playtime Br. 42-43), Playtime rather than Renton is focusing on film content as opposed to the secondary effects of film exhibition. Playtime wholly ignores the fact that adult films rented or purchased from a video store are played in the home. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65-66 (1973).²⁷

As for the vagueness argument, we merely ask the Court to compare Renton's Ordinance with that approved in *Young*. Renton's Ordinance, including the requirement that adult films be played as part of a continuing course of conduct and in a manner appealing to a prurient interest, is as clear and precise as any ordinance of which we are aware.²⁸ In any event, there can be no question that *Playtime* understands the Ordinance and comes within its prohibitions. Playtime's President acknowledged on the record that he was aware of the Ordinance, he knew it applied to him, he intended to show the

²⁷ Video stores are relevant for different reasons, however. They show that these same films are readily available to those in Renton who want to see them. They constitute an "ample alternative mode [] of communication" not only for the same message but through the same medium. Cf. *Taxpayers for Vincent*, 104 S.Ct. at 2133. Moreover, if Renton was concerned about content, it would have attempted to regulate video stores as well as adult theatres.

²⁸ The Detroit ordinance was far more pervasive than this one. In Detroit, an adult theatre could not even locate within 1000 feet of two other hotels, secondhand stores or shoeshine parlors. *Young*, 427 U.S. at 52, incl. n.3. There is no comparable provision in Renton's Ordinance.

adult films covered by the Ordinance, and he intended to do so on a regular, continuous basis.²⁹

CONCLUSION

Playtime concedes that "the power of local governments to zone and control land use is broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both rural and urban communities." Playtime Br. 20. That is what this case is all about. The City of Renton is dealing with a difficult problem—the stark reality of the secondary effects of adult theatres. It recognizes that these theatres and the films they show are entitled to freedom of expression. But it also believes that so long as the populace has ready access to sexually explicit films, *where* they are shown is a matter of legitimate concern and a subject for legitimate regulation by the City. Renton has expressed its concern and its regulation through an Ordinance that gives full play to freedom of expression.

²⁹ JA 328-329, 339, 349, 368; Playtime's Complaint, JS App 61a. Cf. *Young*, 427 U.S. at 58-61. See also the state court opinion describing the character of Playtime's films in the Brief Amicus Curiae of the National League of Cities, *et al.*, App. 1a.

Moreover, it is noteworthy that Playtime did not even develop its record in regard to vagueness (Playtime Br. 46-48 nn.53-61, App. 3-15) in this lawsuit but instead relies entirely upon the record of another case. *City of Renton v. Playtime Theatres*, Cause No. 82-2-01244-2, King County, Washington Superior Court.

The judgment below should be reversed.

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No. 84-1360

Supreme Court, U.S.

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JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1984

— o —
THE CITY OF RENTON, et al,
Appellants,
vs.

PLAYTIME THEATRES, INC.,
a Washington Corporation, et al,
Appellees.

— o —
On Appeal From The United States Court Of Appeals
For The Ninth Circuit

— o —
SUPPLEMENTAL BRIEF OF APPELLEES
— o —

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REASON FOR SUPPLEMENTAL BRIEF

This Supplemental brief is submitted in order to draw the Court's attention to a case not available in time to have been included in Appellees' brief in chief.

—o—

ADDITIONAL ARGUMENT

The core of Appellants' argument to this Court is that a *single* adult theatre causes adverse secondary effects beyond the problems that may be caused by certain businesses concentrating together (Appellants' Brief, 25-26). As pointed out in Appellees' Brief, n.37, no evidence has been offered to support this assertion. In fact, Appellants were not even able to identify the alleged harms at which the ordinance was aimed (Appellees' brief, 24-26). In their Reply Brief (5-6), Appellants perpetuate this specious argument by alleging that "dispersing theatres simply does not solve the underlying problems of adverse secondary effects on residences, schools and the like," without ever identifying what those secondary effects may be. A recent case demonstrates the crumbling foundation on which this argument is constructed.

In *Ebel v. City of Corona*, 767 F.2d 635 (9th Cir. 1985), the Court of Appeals affirmed a decision of the trial court that found a City of Corona adult business zoning ordinance unconstitutional as applied to the plaintiff, Ebel. After a searching factual inquiry, the trial court concluded that the city had not proven that Ebel's adult bookstore led to any of the evils at which the ordinance

was aimed, i.e. deterioration of neighborhoods and corruption of community morals. The trial court “found that Ebel did not ‘substantially subvert’ the purpose of the ordinance and that there was only a ‘minimal effect upon the City’s right to preserve the neighborhood or protect the children or maintain community standards.’” 767 F.2d at 638.

As the court below pointed out, the “studies done by Detroit on the problems of concentrating adult uses are simply not relevant to the concerns of the Renton Ordinance—the proximity of adult theatres to certain other uses.” (App. 19a). Additionally, Justice Powell in *Young v. American Mini Theatres*, 427 U.S. 50, 82, n.5, noted that “[m]ost of the ill effects, however, appear to result from the clustering itself rather than the operational characteristics of individual theatres.” The recent decision in *Ebel* should not be read as standing for the proposition that the introduction of a *single* adult business into a community can never create an adverse secondary effect; rather, it emphasizes the need for each city to “justify its ordinance in the context of [its] problems—not Seattle’s or Detroit’s problems.” (App. 17a).

The result of the factual inquiry undertaken by the trial court in *Ebel* should serve to caution against the relaxation of the burden of proof required of cities enacting content-based restrictions on speech so clearly articulated in *Shad v. Borough of Mount Ephraim*, 452 U.S. 61, 77 (Blackmun, J., concurring), because the alleged secondary effects are “not immediately apparent as a matter of experience.” *Id.* at 73.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,
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REASON FOR SECOND SUPPLEMENTAL BRIEF

This second Supplemental Brief is submitted in order to draw the Court's attention to a case which was not known to Appellees in time to be included in their first Supplemental Brief.

ADDITIONAL ARGUMENT

The operative facts in *International Food v. City of Fort Lauderdale*, 614 F.Supp. 1517 (D.C.Fla. 1985) are virtually identical to those of the case at bar. The analysis of the Court is instructive and persuasive.

The Court felt uncomfortable making a subjective "clairvoyant" evaluation about matters that should be judged only by objective criteria. In particular, the Court was concerned with the problem of local governments establishing *before the fact* that adult entertainment produces a deleterious effect on the community. The Court recognized that "[a]ny local government can hire a group of experts to say that 'adult' entertainment produces undesirable consequences." *Id.* at 1521. Rather than focusing on concerns that may be content related, the Court felt a better approach would be to deal with "those interests within the community whose existence and operation interfere with the peace and tranquillity of the rest." *Id.* at 1522.

Appellees share this concern. Legislative fact finding is undeniably based largely on inadmissible hearsay and opinion evidence which is not subject to cross examination. It is not a search for truth; rather, it is a search for political justification for legislative action.

This Court should not, as Renton urges, abandon its traditional role of closely scrutinizing legislative action that intrudes on protected speech. Rather, this Court should send a clear message that any content-based restriction on speech must be based upon a governmental concern that can be empirically established by competent evidence and that such concern be related solely to the secondary effects of the operational characteristics of a business and not to the perceived secondary effects of the content of the speech.

Another issue discussed by the Court was the issue of access to the market place of constitutionally protected speech. With respect to Sellers, the Court concluded, like all Courts before it, that the dispositive question is whether commercially viable locations are in fact available, not whether legally permissible locations exist.

... the majority [available locations] are located in areas that are so patently unsuitable for businesses like plaintiff's that the regulations effectively zone the subject "adult" entertainment out of the city. *Id.* at 1521.

In addition, the Court found that the lack of suitable locations also hindered the public's First Amendment right to have reasonable access to adult entertainment.

Implicit in this issue is the subsidiary issue of who has the burden of establishing the availability of suitable locations. Logically, under any test, this burden should fall to the city.¹ In the instant case, Renton has never

1. As a practical matter, in formulating a restrictive ordinance, a city must at least identify the legally permissible locations to insure against a zone out. At that point, the permissible loca-

(Continued on following page)

argued that a substantial number of the legally permissible locations are viable or suitable locations for the operation of a commercial business such as a theatre. Additionally, Renton has never disputed the evidence that, as a practical matter, all of the legally permissible locations are, in fact, unavailable (JA 216-228). It has, instead, urged this Court to accept the proposition that the mere existence of legally permissible locations is constitutionally sufficient (Appellants' Brief at 29-35). The record in this case establishes that there are only two suitable locations (JA 231). Neither of these locations is available, and, in fact, one of the two locations is probably too small in size to accommodate a theatre (JA 231). Even if we were to assume that these two suitable locations were available, paraphrasing Judge Gonzales, two or so potential sites in the City of Renton does not a "myriad" make. *Id.* at 1522, citing *Young v. American Mini Theaters*, 96 S.Ct. at 2453 n.35.

(Continued from previous page)

tions should be surveyed to insure both their suitability and availability. If the City is able to substantiate that it in fact identified a substantial number of suitable and available locations during the legislative process, the burden should shift to the challenger to rebut such a prima facie showing. This issue becomes increasingly significant as the size of the municipality increases. In large metropolitan areas, it may be financially burdensome or next to impossible to prove, as an initial proposition, the negative that no locations exist.

CONCLUSION

The interest of the American people in the preservation of their right to live and express themselves free from government intrusion is more important than the interests which the Appellants assert. The decisions of a municipal body, which serves the will of the majority, regarding precious First Amendment rights must remain subject to the closest judicial scrutiny.

Respectfully submitted,

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CLERK

IN THE
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BRIEF OF AMICI CURIAE WASHINGTON AND UTAH
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INTEREST OF AMICI CURIAE

The interest of the Washington and
Utah State Attorneys General Offices is
to be of assistance to this Court in
establishing the legal parameters within

which small and large cities alike may adopt zoning ordinances dealing with adult movie theaters. Other cities in Washington similar in size to Renton, are currently studying the issue with the intent to enact an ordinance.

While this Court addressed a number of the relevant issues in Young, there remains a need to further clarify and address the issues presented by this case so as to provide necessary guidance to these, and other cities across the country. Accordingly, the Attorneys General, as amici, here support the appeal of the City of Renton.

SUMMARY OF ARGUMENT

In enacting the questioned zoning ordinance, the City of Renton properly relied on (1) the experience of other cities and (2) the legal precedent of

this Court and of the Washington State Supreme Court.

The city attempted to responsibly enact a zoning ordinance dealing with adult movie theatres. To avoid the "cycle of decay" experienced by other cities, the city attempted to adopt a preventive ordinance. Its motive was to protect and preserve the "quality of life" in this small residential community.

The effect of such zoning practice on First Amendment rights is limited and incidental. When those rights are balanced against the legitimate concerns of the city the result should be a sustaining of the zoning measure.

ARGUMENT

A City May Appropriately Rely on the Experience of Other Cities in Enacting a Responsible Preventive Zoning Ordinance.

Renton is a small residential community with a population of about 33,340 located immediately adjacent to Seattle, a large metropolitan city. It is comprised of approximately twenty-five downtown blocks. Many Renton residents commute to Seattle and its suburban areas for employment.

In 1981 Renton adopted a zoning ordinance dealing with adult motion picture theatres showing films depicting "specified sexual activities" or "specified anatomical areas." At the time there were no such theatres in Renton. Thus, in an attempt to preserve and protect the "quality of life" in Renton, the city undertook to adopt a

preventive zoning ordinance. Such responsible preventive measures surely have a place in zoning laws.

A city acts responsibly when it studies the issue, holds public hearings, complies with its own procedures for adoption of a zoning ordinance and proceeds with a proper motive. Here the city studied the issue for almost a year, held public hearings and took testimony from concerned citizens as summarized in the ordinance itself. App. 81a. On the face of the ordinance, the city's intent is set forth as follows:

" . . . to promote the city of Renton's great interest in protecting and preserving the quality of its neighborhoods, commercial districts and the quality of urban life through effective land use planning; . . . " App. 81a.

This Court has long recognized the validity of zoning ordinances and has

given due deference to the body enacting the ordinance.

"If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." Euclid v. Ambler Co., 272 U.S. 365, 388 (1926).

The right to protect "quality of life" through zoning may be the most essential function performed by a local government. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), (Marshall, J. dissenting). In Boraas, "quality of life" was said to take into account family values, youth values, the blessing of quiet seclusion and clean air. The zoning ordinance there at issue restricted land use to one-family dwellings. The ordinance was challenged as a violation of First Amendment freedom of association and the constitutional

right of privacy. This Court, however, upheld the ordinance as a legitimate guideline in a land-use project addressed to family needs.

In the instant case, the City of Renton's attempt to protect and preserve its "quality of life" led to its adoption of the instant zoning ordinance before adult theatres moved into the city. In enacting such a preventive ordinance Renton properly relied on the experience of other cities, in particular Seattle.

In 1976 the City of Seattle amended its zoning code following a long period of study and discussion of the problems of adult movie theatres in its residential areas. The goal of the city was to protect and preserve the character and quality of residential life in its neighborhoods through effective land-use

planning.

The Supreme Court of Washington upheld the zoning ordinance. Northend Cinema v. Seattle, 90 Wn.2d 709, 585 P.2d 1153 (1978), cert. denied sub. nom. Apple Theatre, Inc. v. City of Seattle, 441 U.S. 946 (1979). In so doing it recognized that the city's paramount interest in protecting, preserving and improving quality of life was sufficient to justify zoning the location of adult movie theatres to certain areas through land use planning and regulation.

"At the public hearing Greenwood residents spoke of their concerns regarding the deterioration of residential neighborhoods that accompanies location of adult movie theatres. The concerns expressed were very specific and included the attraction of transients, parking and traffic problems, increased crime, decreasing property values, and interference with parental responsibilities for children."

Id. at 712.

In enacting its ordinance, the Detroit city council in another case heard expert testimony that the location of several adult movie theatres attracted transients, adversely affected property values, caused an increase in crime and encouraged residents and businesses to move elsewhere. Young v. American Mini Theatres, 427 U.S. 50, 55, 71, n. 34 (1976). The experts and the city council relied on the experience of other cities which revealed a "cycle of decay" that had started and "could be expected in Detroit." Id. at 81, n. 4 (Powell, J. concurring) (Emphasis added).

Likewise, the City of Renton, relying upon the experience of Seattle and Detroit and the testimony of many citizens during Renton's own public

meetings, adopted findings similar to the Seattle and Detroit ordinances. Such action hardly required expert testimony. Resort to observation of common sense experience in urban land-use planning would be sufficient to lead a prudent city council to conclude that the proximity of such theatres to family-oriented neighborhoods will cause the degradation of the community which its zoning plan is supposed to prevent.

Why should a small residential city like Renton be forced to experience for itself the lesson already learned by other cities across the country--and particularly the experience of a major city located directly adjacent to it? In Schad, this Court recognized the propriety of relying on such experience. Schad v. Mount Ephraim, 452 U.S. 61, 73

(1981). It is important that city planners be aware of new conditions, new discoveries and the experience of others which cause new concepts of social needs and innovative zoning to address those needs.

In the Euclid zoning case this Court recognized the deference to be accorded those who recognize a specific need and then identify a specific type of zoning ordinance to address the need. Euclid v. Ambler Co., 272 U.S. 365, 388 (1926).

"A nuisance may be merely a right thing in the wrong place, --like a pig in the parlor instead of the barnyard." Id.

Many years after Euclid, this Court, in referencing this simile, stated that when a city finds the pig has entered the parlor, the exercise of police power does not depend on proof that the pig is obscene. F.C.C. v. Pacifica Foundation,

438 U.S. 726 (1978). So too, small cities should not be required to prove by their own experience, a deterioration in their most precious commodity--"quality of life." Renton can reasonably rely on the experience of cities like Detroit and Seattle. The obvious should not be left unstated here. By virtue of its size in relation to these large cities, Renton has much more to lose. Its responsible preventive measures should be upheld.

"Quality of Life" Concerns of the City and First Amendment Interests of Adult Movie Theatres Should be Balanced in Favor of the City Zoning Ordinance.

Amici are not suggesting deference be given the city in total disregard of First Amendment rights. Concerns of the city and the interests protected in the First Amendment, however, are balanced in favor of Renton's ordinance. The ordinance does not suppress production,

deny business access to the market nor does it, to any significant degree, restrict access to adult theatres. Interference with First Amendment protection is only incidental.

On the other hand, if the zoning ordinance was in effect a total suppression, then the interference with the First Amendment would be substantial. That, however, is not the situation with the Renton ordinance.

At issue is the zoning of businesses exhibiting motion pictures for profit--commercial speech. Such speech is not afforded the full protection provided pure speech conveying a social, political or philosophical message. Commercial speech is entitled to some protection under the First Amendment governed largely by the content of the

communication. Va. Pharmacy
Bd. v. Va. Consumer Council, 425 U.S. 748
(1976).

The motive of the City of Renton was not the suppression of free speech but the protection and preservation of the City's "quality of life." App. 81a. That justification is sufficient and should not be subject to attack. Schad, 452 U.S. at 67. Zoning of adult movie theatres by Renton to protect the "quality of life" is valid because it implicates "First Amendment concerns only incidentally and to a limited extent." Young, 427 U.S. at 73. (Powell, J. concurring).

CONCLUSION

The cities of Washington state are like those of many other states. Small communities like Renton jealously guard their residential character. Preventive versus after-the-fact zoning is an appropriate means for cities to use in protecting and preserving possibly their most valuable resource--"quality of life." As a number of other cities attempt to venture through this course, it is important that they have the guidance of this Court. A reversal of the Ninth Circuit decision would provide cities with the ability, through preventive zoning like Renton's, to

continue to preserve and protect their
"quality of life."

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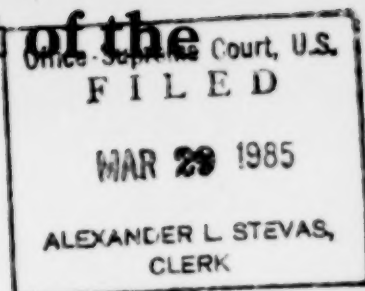
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**BRIEF OF AMICI CURIAE
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No. 84-1360

In the Supreme Court of the United States

OCTOBER TERM, 1984

THE CITY OF RENTON, *et al.*,

Appellants,

v.

PLAYTIME THEATERS, INC., a Washington
corporation, *et al.*,

Appellees.

BRIEF OF AMICI CURIAE CITY OF WHITTIER, CALIFORNIA AND OTHER JOINING CALIFORNIA CITIES IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

STATEMENT OF THE CASE

Amici curiae the City of Whittier *et al.* adopt in full the Statement of the Case made by Appellants, the City of Renton, *et al.* (hereinafter "Renton").

INTEREST OF THE AMICI

*Amici curiae*¹ are all cities located in the State of California.² Many of the 409 cities in California have adopted and are enforcing zoning ordinances which regulate the location of "adult" businesses as expressly authorized by this Court in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), (hereinafter "*Young*").³ Without action by this Court, the judgment of the Ninth Circuit Court of Appeal in *Playtime Theaters, Inc. v. The City of Renton*, 748 F.2d 527 (9th Cir. 1984) will become a binding precedent emasculating the zoning powers of these cities as described in *Young*, not only as to adult theatres, but to all adult business.⁴ *Amici* submit that the judgment of the Ninth Circuit should be reversed.

¹Appendix "A" hereto sets forth those California cities joining in this Brief.

²*Amici* are represented by their respective authorized law officers and as political subdivisions of the State of California are not required to obtain consent of all parties for the filing of this Brief. Sup.Ct.R. 36.4.

³See, e.g., *City of Whittier v. Walnut Properties*, 149 Cal.App.3d 633, 197 Cal.Rptr. 127 (1983); *Strand Properties Corp. v. Municipal Court*, 148 Cal.App.3d 882, 200 Cal.Rptr. 47 (1983); *County of Sacramento v. Superior Court*, 137 Cal.App.3d 448, 187 Cal.Rptr. 154 (1982); *Walnut Properties v. City Council of the City of Long Beach*, 100 Cal.App.3d 1018, 161 Cal.Rptr. 411 (1980). At least two *Amici*, the City of Whittier and City of Corona, are involved in cases similar to the instant matter which are pending on appeal in the Ninth Circuit Court of Appeal. Oral argument in *Walnut Properties, Inc. v. City of Whittier*, Nos. 84-5755 and 84-6087, took place on February 8, 1985; oral argument is scheduled in *Ebel v. City of Corona*, Nos. 84-5688 and 84-5785, for April 8, 1985.

⁴J. Robert Flandrick, counsel of record for *Amici*, is an officer of the City Attorneys' Division of the League of California Cities. As such, he has been advised that a number of cases which involve California cities presenting similar issues to those raised in this appeal are pending in State and Federal courts in California.

Regulation by zoning is a legitimate and vital power of municipalities in California. See, Cal. Gov't Code §§65000-66403 (Deering 1985); *Hill v. City of Manhattan Beach*, 6 Cal.3d 279, 285, 491 P.2d 369, 372-73, 98 Cal.Rptr. 785, 788-89 (1971).

As this Honorable Court has noted, the exercise of reserved police powers by a city,

"is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

This Honorable Court has long recognized that the zoning power is essential to effective urban planning. Although the exercise of such power is subject to judicial review in a proper case, adoption of zoning regulations is a legislative function. Dissatisfied citizens have the availability of the normal democratic process to press their objections to such legislative acts. *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975).

In California, zoning is statutorily defined as a legislative function. Cal. Gov't Code §65850 (Deering 1985); *Arnel Development Co. v. City of Costa Mesa*, 28 Cal.3d 511, 516-22, 620 P.2d 565, 568-71, 169 Cal.Rptr. 904, 907-10 (1980). As such, when enacting a zoning ordinance a legislative body is not required to make findings of fact as would be the case in a quasi-judicial activity. *Ensign Bickford Realty Corp. v. City Council*, 68 Cal.App.3d 467, 473, 137 Cal.Rptr. 304, 307 (1977).

Orderly planning is vital to California cities. Each such city is required by statute to prepare a complete

General Plan regulating future growth of the city. Cal. Gov't Code §§65300-65403 (Deering 1985). The *Renton* opinion and other Ninth Circuit decisions⁵ have frustrated this statutory planning process and have effectively thwarted orderly urban growth by eliminating the power of cities to impose reasonable zoning regulations on First Amendment activities.⁶

Like Renton, many of the *Amici* are smaller cities located in or adjacent to large metropolitan areas. As

⁵See, e.g., *Lydo Enterprises v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984); *Tovar v. Billmeyer*, 721 F.2d 1260 (9th Cir. 1983); *Ebel v. City of Corona*, 698 F.2d 390 (9th Cir. 1983); *Kuznich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982). California courts, however, have upheld similar zoning ordinances regulating adult businesses. See, *City of Whittier v. Walnut Properties*, 149 Cal.App.3d 633, 197 Cal.Rptr. 127 (1983); *Strand Properties v. Municipal Court*, 148 Cal.App.3d 882, 200 Cal.Rptr. 47 (1983); *County of Sacramento v. Superior Court*, 137 Cal.App.3d 448, 187 Cal.Rptr. 154 (1982); *Walnut Properties v. City Council of the City of Long Beach*, 100 Cal.App.3d 1018, 161 Cal.Rptr. 411, cert. denied, 449 U.S. 836 (1980).

⁶While *Amici* assert that the disregard of lower Federal courts of this Court's decision in *Young* is the most important issue in this case, a subordinate issue is raised by the Ninth Circuit's refusal to abstain or stay proceedings in this case pending resolution of a pending state action concerning the constitutionality of Renton's ordinance. *Renton*, 748 F.2d at 532-33. Because there is concurrent jurisdiction in this area, Federal courts are often faced with this issue. In California, on many occasions Federal courts have declined to stay subsequently filed Federal cases to allow California courts to proceed to hear such matters. See, e.g., *Walnut Properties v. City of Whittier*, Nos. 84-5755 and 84-6087 (9th Cir. argued Feb. 8, 1985); *City of Whittier v. Walnut*, 149 Cal.App.3d 633, 197 Cal.Rptr. 127 (1983); *Walnut Properties v. City Council of the City of Long Beach*, 100 Cal.App.3d 1018, 161 Cal.Rptr. 411, cert. denied, 449 U.S. 836 (1980); *Walnut Properties v. Long Beach*, No. 81-942-TJH (C.D.Cal. 1981), *aff'd.*, No. 81-5732 (9th Cir. 1982). Guidance by this Court is appropriate and is required to avoid the waste of judicial time and the undermining of judicial integrity occasioned by such multiple lawsuits.

a result of the growth of the adult business industry, together with the adoption of zoning ordinances regulating adult businesses in larger cities, many adult businesses are relocating in these smaller adjacent cities. This has been the experience in Renton and of cities in California.

The City of Seattle, located adjacent to Renton, enacted zoning ordinances regulating adult theatres which were unanimously upheld by the Washington Supreme Court. *Northend Cinema, Inc. v. City of Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978), cert. denied, 441 U.S. 945 (1979). It was after that Court's decision that Renton considered and enacted its ordinance regulating adult theatres in a manner similar to that adopted by Seattle.

Cities and towns across California (as represented by *Amici*) believe it necessary that this Court consider the appeal by Renton in order to reaffirm this Court's decision in *Young*, and to correct the trend in the Ninth Circuit and other Circuits to limit cities' zoning power to control adult businesses.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeal has held that Renton's adult business regulations violate the First Amendment because Renton failed to independently establish a substantial governmental interest in such regulation, and the passage of the ordinance effected an unlawful suppression of constitutionally protected speech.

This case is deserving of a full review of this Honorable Court because Renton should be permitted to rely upon the experience of other cities for the factual foundation

supporting its regulation of adult businesses. Use of a common pool of knowledge and experience is a customary and appropriate legislative practice for any city to engage in.

ARGUMENT

THIS HONORABLE COURT SHOULD UNDERTAKE TO REVIEW THE DETERMINATION OF THE NINTH CIRCUIT IN *PLAY-TIME THEATERS, INC. V. RENTON* BECAUSE THE LOWER FEDERAL COURTS HAVE EFFECTIVELY EMASCULATED THIS COURTS' DECISION IN *YOUNG V. AMERICAN MINI THEATRES*.

In *Young*, this Court upheld the City of Detroit's zoning ordinance which regulated the location of adult theatres within the City. Justice Stewart, writing in dissent, declared, "I can only interpret today's decision as an aberration." *Young*, 427 U.S. at 87 (Stewart, J., dissenting). Nine years later, this prediction approaches reality.

In the last nine years only one United States Court of Appeal decision has upheld an adult business zoning ordinance.⁷ In most of these Federal cases the ordinances in question were virtually identical to the ordinance upheld by this Court in *Young*. Courts in the First, Fifth, Sixth, Eighth and Ninth Circuits have systematically invalidated such zoning enactments,⁸ thus

⁷*Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980).

⁸*Ebel v. City of Corona*, 698 F.2d 390 (9th Cir. 1983); *Kuznich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982); *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1981); *Keego Harbor v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981); *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115 (1st Cir. 1981);

thwarting the good-faith efforts by cities and towns to accommodate their zoning interest and the First Amendment rights at issue. This history demonstrates that this Court's decision in *Young* has been totally emasculated by lower Federal courts.

Where the "O'Brien" test⁹ is met, California State courts, on the other hand, have had little difficulty in upholding *Young* type ordinances enacted by California cities.¹⁰

In *County of Sacramento v. Superior Court*, 137 Cal.App.3d 448, 187 Cal.Rptr. 154 (1982), the California Court stated:

"[The plaintiff] Goldie asserts that the identical ordinance must be tested anew each time it is enacted by a different governmental entity by establishing the actual existence of locale conditions which would justify it. Goldie's thesis would deny to lawmakers in one locale the benefit of the wisdom and experience of lawmakers in another community, no matter

Entertainment Concepts, Inc. v. Maciejawski, 631 F.2d 497 (1980), cert. denied, 450 U.S. 919 (1981); *E&B Enterprises v. City of University Park*, 449 F.Supp. 695 (N.D. Tex. 1977); *Alexander v. City of Minneapolis*, 531 F.Supp. 1162 (D.Minn. 1982), aff'd., 698 F.2d 936 (8th Cir. 1983); *Purple Onion, Inc. v. Jackson*, 511 F.Supp. 1207 (N.D. Ga. 1981).

⁹*United States v. O'Brien*, 391 U.S. 367, 377 (1968).

¹⁰*City of Whittier v. Walnut Properties*, 149 Cal.App.3d 683 (1983) 197 Cal.Rptr. 127; *Strand Properties Corp. v. Municipal Court*, 148 Cal.App.3d 882, 200 Cal.Rptr. 47 (1983); *County of Sacramento v. Superior Court*, 137 Cal.App.3d 448 (1982), 187 Cal.Rptr. 154; *Pringle v. The City of Covina*, 115 Cal.App.3d 151, 171 Cal.Rptr. 251 (1982); *Ebel v. City of Garden Grove*, 120 Cal.App.3d 399, 176 Cal.Rptr. 312 (1982); *Walnut Properties, Inc. v. City Council of the City of Long Beach*, 100 Cal.App.3d 1018, 161 Cal.Rptr. 411, cert. denied, 449 U.S. 836 (1980).

how similar the circumstances; it would, as it were, require the reinvention of the wheel countless times over when mere access to common knowledge would render the considerable effort involved unnecessary. In dealing with closed booths in picture arcades, lawmakers need not blink the obvious [sic]. It cannot seriously be maintained that patrons of Sacramento County adult picture arcades do not to some degree sufficient to justify governmental concern share the proclivities of their counterparts in Los Angeles and Phoenix. Reasonable anticipation of such problems is itself sufficient to justify the official reaction embodied in chapter 9.87 of the Sacramento County Code." *Id.* at 455, 187 Cal.Rptr. at 158-59 (citation and footnote omitted).¹¹

One major error which has often occurred in Federal court opinions purporting to follow the *Young* decision was made by the Court of Appeal in the instant case. Unlike the California and Seventh Circuit cases discussed above, the Court of Appeal held that Renton could *not* rely on the experience of other towns and cities to justify its zoning regulation.¹² The panel in *Renton* analyzed the *Young* opinion as follows:

¹¹*Accord, Strand Properties Corp. v. Municipal Court*, 148 Cal.App.3d 880, 887, 200 Cal.Rptr. 47, 49 (1984); *Genusa v. City of Peoria*, 619 F.2d 1203, 1211 (7th Cir. 1980).

¹²It is respectfully submitted that this Honorable Court should note probable jurisdiction in this case to resolve the conflict between the Ninth Circuit's decision in *Renton* and the cases cited in footnote 11, *supra*, and the text accompanying said footnote. As the Court stated in *Dowd Box Co. v. Courtney*, 368 U.S. 502, 513 (1962), "To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court."

"The plurality in *Young* found that the record disclosed a factual basis for the council's determinations, 427 U.S. at 71, and Justice Powell cited 'reports and affidavits from sociologists and urban planning experts, as well as some layman.' *Id.* at 81 n.4 (Powell, J., concurring)." *Renton*, 748 F.2d at 536.

The quoted language is incomplete; when read in full it is clear that the record in *Young* disclosed that witnesses testified concerning the problems of *other* cities, which problems could be expected to occur in Detroit absent regulation of adult business.¹³

The Ninth Circuit's requirement that each city must make a full independent and repetitive investigation denies to these cities the benefit of the experience of others while imposing a wasteful expenditure of public funds. Smaller towns and communities should not be required to spend the enormous amount of time and funds necessary to merely duplicate the research and testimony of experts obtained in larger cities. Justice Powell's concurring opinion in *Young* expressly recognized that the law does not require a city to wait until its citizens suffer their own personal disaster before adopting legislation to attempt to avert such disasters. Moreover, so long as there is no substantial adverse impact on the dissemination of adult film fare, cities and towns must have leeway to fashion innovative solutions to the problems that inevitably accompany the

¹³The complete sentence is: "That evidence consisted of reports and affidavits from sociologists and urban planning experts, as well as some laymen, on the cycle of decay that *had been started in areas of other cities*, and that could be expected in Detroit, from the influx and concentration of such establishments." *Young*, 427 U.S. at 81 n.4 (Powell, J., concurring) (emphasis added).

opening of adult theaters. This Court should therefore accept jurisdiction in this matter to clarify this misapplication of its decision in *Young* and to restate the doctrine of judicial deference to legislative acts.

CONCLUSION

Based upon the foregoing, this Honorable Court should undertake a full review of all the facts and issues involved in the matter of the validity of Renton's adult business zoning regulations, not only for the purpose of adjudicating the rights of the parties in that litigation, but to restate the posture of zoning authorities, in general, throughout the United States when confronted with issues relating to First Amendment activities.

DATED: March 27, 1985

Respectfully submitted,

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APPENDIX "A"

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County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on March 27, 1985 I served the within *Brief of Amici Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 27, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

MOTION FILED
MAR 29 1985

No. 84-1360

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE CITY OF RENTON, *et al.*,
v. *Appellants,*

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

MOTION TO FILE BRIEF *AMICUS CURIAE*
AND BRIEF *AMICUS CURIAE*
OF THE NATIONAL LEAGUE OF CITIES,
THE NATIONAL ASSOCIATION OF COUNTIES,
THE INTERNATIONAL CITY
MANAGEMENT ASSOCIATION,
THE UNITED STATES CONFERENCE OF MAYORS,
THE COUNCIL OF STATE GOVERNMENTS,
AND THE AMERICAN PLANNING ASSOCIATION
IN SUPPORT OF A PLENARY HEARING
AND REVERSAL OF THE DECISION BELOW

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QUESTION PRESENTED

May a city government require that "adult" motion picture theaters not be located where they would adversely affect children, schools, churches, property values and the quality of life, but instead be located in commercial areas more suitable for the showing of movies depicting explicit sexual acts?

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1360

THE CITY OF RENTON, *et al.*,
v. *Appellants,*

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF OF THE NATIONAL LEAGUE OF CITIES,
THE NATIONAL ASSOCIATION OF COUNTIES,
THE INTERNATIONAL CITY
MANAGEMENT ASSOCIATION,
THE UNITED STATES CONFERENCE OF MAYORS,
THE COUNCIL OF STATE GOVERNMENTS,
AND THE AMERICAN PLANNING ASSOCIATION**

Pursuant to Rule 36 of the Rules of the Court, *amici* respectfully move this Court for leave to file the attached brief *amicus curiae* in support of appellant City of Renton and its officials.¹

The *amici* are organizations whose members include state, city and county governments and officials located

¹ Appellants have consented to the filing of this brief. Appellees have not.

throughout the United States, and an organization comprised of city and regional planners and officials concerned with planning.

This case is of vital importance to *amici* and their members, because it presents constitutional issues affecting the power of government to regulate the permissible locations of "adult" motion picture theaters. The case thereby has an important impact upon the essential interest of state and local governments in protecting and preserving the quality of neighborhood life through effective land use planning. City officials have attempted to reconcile First Amendment values with traditional zoning principles, in accordance with this Court's guidance in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), *reh'g denied*, 429 U.S. 873 (1976). Decisions of the Ninth Circuit and other United States courts of appeals, however, overturning ordinances essentially similar to the Detroit ordinance upheld by this Court in *Young*, leave state and local governments in need of further instruction from this Court.

For these reasons, *amici* seek leave to file this brief to assist the Court in its consideration of this litigation.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1360

THE CITY OF RENTON, *et al.*,
Appellants,

v.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

**BRIEF *AMICUS CURIAE* OF
THE NATIONAL LEAGUE OF CITIES,
THE NATIONAL ASSOCIATION OF COUNTIES,
THE INTERNATIONAL CITY
MANAGEMENT ASSOCIATION,
THE UNITED STATES CONFERENCE OF MAYORS,
THE COUNCIL OF STATE GOVERNMENTS,
AND THE AMERICAN PLANNING ASSOCIATION
IN SUPPORT OF A PLENARY HEARING
AND REVERSAL OF THE DECISION BELOW**

INTEREST OF THE AMICI

The interest of the *amici* is set forth in the motion for leave to file this brief.

STATEMENT OF THE CASE

This case concerns the effort of a small city to protect its neighborhoods by limiting the location of "adult" motion picture theaters which show sexually explicit films.¹

Renton, Washington is a city of less than 35,000 population, situated south of Seattle on Lake Washington. The citizens of Renton, like those in many communities throughout the country, have tried to make their city "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Berman v. Parker*, 348 U.S. 26, 33 (1954). Since April 1965, when Renton adopted its first comprehensive plan,² the city has

¹ The "adult" movies at issue here were described in the decision of the State trial court. They were found to contain

"a substantial content of highly repetitive, sexually explicit conduct, which includes masturbation, fellatio, cunnilingus, oral, anal and vaginal sexual intercourse, often occurring simultaneously and involving several people, repetitive ejaculation visibly displayed, to the body and usually to the face of female participants." They also contain "[s]ame sex activity . . . limited generally to women, [and] mixed groups of men and women such as two men and one woman or two women and one man or numerous people engaged in various activities simultaneously. . . ." Memorandum Decision, March 9, 1984, *City of Renton v. Playtime Theatres, Inc.*, Superior Court for the State of Washington for King County, No. 82-2-02344-2 at 21 (hereinafter *Mem. Dec. Sup. Ct. Wash.*).

² "The purposes of the comprehensive plan are: To improve the physical and social environment of the city as a setting for human activities—to make it more functional, beautiful, decent, healthful, interesting, and efficient; To ensure acceptable levels of access, utilities and other public services to future growth and development[;] To promote the public interest, and the interest of the city at large[;] To facilitate the democratic determination and implementation of City policies and developments; To effect coordination in development; To inject long-range considerations into the determination of short-range actions; and To provide professional and technical knowledge in the decisions affecting development of the City." *City of Renton, Comprehensive Plan Compendium* 3, January 1985, (available at City Hall, Renton, Washington).

"The overriding consideration is to promote public safety, welfare, and interest. Additional factors to be considered (not in order of priority) are preservation of property rights, protection of

worked to develop and maintain a community that is a good place to live.

Renton has retained much of its original downtown core area which contains not only "commercial uses, but single residences and church and school uses which have been, and continue to be, a part of the neighborhood."³ As part of its comprehensive plan, Renton adopted area-specific plans including one for the central area of the city. That plan was developed and refined through "a process of field analysis, data gathering and public input, two public meetings and one public hearing" between 1979 and 1982.⁴ The central downtown area was conceived as one providing for "sufficient retail services to accommodate the projected residential and employment population of the area." It also includes a "variety of housing opportunities, including single family and multiple family housing" for close-in living.⁵ Development and redevelopment were planned along the Cedar River to maintain a recreational flavor in that portion of the community.⁶

life and property, equal opportunities, public interests prevailing over private interests, and economic and social benefits. *City of Renton, Comprehensive Plan Compendium*, *supra* at 3.

³ *Mem. Dec. Sup. Ct. Wash.* at 5. The state court judge also noted that "[s]ubstantial recent investment in amenities is clearly evident and within a very close proximity of the theater, residences, businesses, schools and churches, there are also municipal buildings and a series of waterfront parks and recreational and civic use facilities. . . ." *Id.* at 5-6.

⁴ *City of Renton, Comprehensive Plan Compendium*, *supra* at 61. In adopting specific ordinances, which form part of the comprehensive plan, the usual local government process of study, committee meetings, council meetings and public hearings was followed. For example, before the Council adopted the "adult" theater ordinance in question, the Planning and Development Committee held at least six meetings. *Jurisdictional Statement of Appellants*, at 5, fn. 4.

⁵ *City of Renton, Comprehensive Plan Compendium*, *supra* at 62.

⁶ *Id.* at 63.

As part of the effort to maintain the central area of the city as a good place to live, Renton adopted a number of zoning ordinances,⁷ including one adopted in April, 1981, dealing with "adult" motion picture theaters. Patterned after the Detroit ordinance approved by this Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976),⁸ the ordinance attempts to prevent the operation of "adult" motion picture theaters in areas close to schools, residences, churches and public parks. It was adopted after almost a year of study following public hearings at which the city council heard testimony and reviewed exhibits indicating the potential adverse effect of "adult" entertainment uses on property values and the social climate of business and residential areas of the city.

The ordinance,⁹ which expressly relied on the adverse effects of "adult" motion picture theaters on neighborhoods in Seattle, Detroit and other cities, was adopted before any such use was established or, as far as anyone knew, contemplated in Renton itself. The District Court

⁷ *Id.* at 1. See also, Renton, Wash., Code, Chapter 7 of Title 4, Zoning, §§ 4-701 *et seq.* (available at Renton City Hall, Renton, Washington).

⁸ The Renton ordinance, unlike the Detroit ordinance, provides only for civil, not criminal, penalties.

⁹ The first ordinance, adopted in April 1981, contained the following definitions:

"1. 'Adult Motion Picture Theater': An enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' as hereafter defined, for observation by patrons therein.

"2. 'Specified Sexual Activities':

- (a) Human genitals in a state of sexual stimulation or arousal;
- (b) Acts of human masturbation, sexual intercourse or sodomy;

found that five hundred and twenty acres, or approximately five percent of the total land area, remained available for "adult" motion picture use.¹⁰ The available land is zoned for commercial and industrial park uses and is adjacent to a freeway interchange. The area in question, the Valley Planning Area, is "a developing area of industrial, commercial, and office uses." It is to be "developed with a diversity of high quality industrial, commercial and office uses" and "should be the principal

-
- (c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

"3. 'Specified Anatomical Areas'

- (a) Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and
- (b) Human male genitals in a discernible turgid state, even if completely and opaquely covered." App. L, 78a-79a, (References in this form are to the Appendix to the Jurisdictional Statement.

The ordinance prohibited "adult" motion picture theaters within 1000 feet of any residential zone or any single family or multiple family use, any church or any public park or park zone. It also prohibited such use within one mile of any public or private school. App. L, 99a. This latter provision was amended in May 1982 to prohibit "adult" theater uses within 1000 feet of any school, thus expanding the area available for such entertainment facilities. App. M, 87a. The amended ordinance also clarified the term "used" by defining it as

"a continuing course of conduct of exhibiting 'specific [sic specified?] sexual activities' and 'specified anatomical areas' in a manner which appeals to a prurient interest." *Ibid.*

¹⁰ The Court of Appeals questioned the validity of this finding. App. A, 13a-14a. *Amici* do not wish to engage in an evidentiary dispute, but note that the Court of Appeals' opinion implies that some area was in fact available for such use. Appellants' brief reviews the factual evidence and demonstrates persuasively that there was ample scope for adult entertainment uses commensurate with the size of the city of Renton, even if the available area was not at large as the District Court found.

growth area for these uses" within the city.¹¹ It is within 15 minutes driving distance of any area in Renton.

In January, 1982, Playtime purchased the Renton theater, knowing that it was within the area proscribed by the ordinance, for the admitted purpose of exhibiting "adult" motion pictures. Before completing its purchase, Playtime filed an action in federal court on January 20, 1982,¹² asking that the ordinance be declared unconstitutional and that its enforcement be permanently enjoined. On January 11, 1983, adopting the findings of a magistrate, the district court granted a preliminary injunction. App. A, 35a-36a. For the first time Playtime began showing adult movies at the Renton theater.

The parties stipulated to submit the case for a determination whether a permanent injunction should issue on the basis of the record already developed. On February 17, 1983, the district court denied the permanent injunction. App. 32a. Finding that 520 acres were available as potential sites for adult theater use, the court concluded that the ordinance did not substantially restrict First Amendment interests. The court also held that the city was not required to show specific adverse impact on Renton from the operation of adult theaters, but could rely on the experiences of other cities. Lastly, the court found that the purposes of the ordinance were unrelated to the suppression of speech and that the restrictions it

¹¹ City of Renton, *Comprehensive Plan Compendium*, *supra* at 33. Only one small area is designated for heavy industrial use. *Id.* at 47.

¹² A month later, in February, 1982, Renton brought suit in state court seeking a declaratory judgment that the ordinance was constitutional on its face and alleging that an actual dispute existed because of Playtime's pending federal lawsuit asserting that the ordinance was unconstitutional. Renton also moved to dismiss Playtime's federal action on grounds of abstention. The federal district court subsequently ruled that abstention was improper. App. A, 4a.

imposed were no greater than necessary to further the governmental interests at stake.¹³

Playtime appealed, and the Ninth Circuit reversed. The Court of Appeals declared that it had an obligation to scrutinize strictly zoning decisions that infringe First Amendment rights. It disagreed with the district court as to the availability of land and concluded that the limited area allowed for "adult" theater uses would cause a substantial restriction on freedom of speech. Using the four-part standard of review set forth in *United States v. O'Brien*, 391 U.S. 367 (1968),¹⁴ the Ninth Circuit subjected the district court's decision to *de novo* review as involving mixed questions of fact and law. The Court of Appeals conceded that, under the *O'Brien* test, the regulation was within Renton's constitutional power, but stated that Renton had not shown a substantial governmental interest in enacting the ordinance, as the ordinance itself contained only conclusory statements. The Ninth Circuit also found that Renton did not meet the

¹³ The state court complaint was later amended by Renton to seek abatement of the operation of the theater. The Superior Court judge used an advisory jury drawn from the King County jury pool, which represented a cross-section of individuals and backgrounds, to consider 10 films stipulated to be typical of those presented at the Renton theater by Playtime. The court applied the high standard of proof, *i.e.*, clear, cogent and convincing evidence, used in *Casper v. Mitchell Brothers' Santa Ana Theatre*, 454 U.S. 90 (1981), *reh'g denied*, 456 U.S. 920 (1982), in determining that their exhibition should be abated. The state court judge held exhibition of the films submitted to the court as typical of those shown at the theater constituted "a nuisance per se, and an 'adult motion picture theater' as defined" in the ordinance and should be abated. Mem. Dec. Sup. Ct. Wash. at 40.

¹⁴ The test is: "[A] governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. at 377 (1968).

third prong of the *O'Brien* test, as Renton "has not proved that the regulation is unrelated to the suppression of speech." The court never reached the fourth prong of the test to determine whether "the incidental restriction on First Amendment freedom is no greater than essential to further [Renton's governmental] interest."

SUMMARY OF ARGUMENT

1. This case is of paramount importance to state and local officials all across the nation. They are concerned with community planning aimed at preserving the quality of life in urban neighborhoods. Their efforts to achieve this purpose through the use of zoning were approved by this Court in *Young*, where the Court ruled expressly that a city's zoning power allows enactment of ordinances which regulate the location of "adult" theaters showing sexually explicit films. But despite the ruling in *Young*, the decisions of the courts of appeals in this and other cases cast doubt on the ability of a city to exercise its zoning power to regulate the location of "adult" theaters.

Unlike this Court, the Ninth Circuit declined to recognize the important community interest in preserving the quality of urban life, and struck down the Renton ordinance as allegedly lacking substantial government interest and being suppressive of free speech. The court below failed to recognize that the ordinance does not prevent the communication or reception of any ideas, but simply limits the places where "adult" films may be exhibited.

2. The Ninth Circuit opinion imposes a difficult evidentiary burden on local governments seeking to protect children, schools, churches, and residential neighborhoods from the anticipated adverse effects of "adult" uses. The burden demanded by the Ninth Circuit is inconsistent with the views of this Court in *Young*. Furthermore, the precise requirements of the burden are undefined, so that cities are left in doubt as to what investigation and study must be undertaken before adopting zoning regulations

reasonably designed to forestall the problems attendant upon "adult" entertainment uses.

3. The Ninth Circuit opinion is also inconsistent with decisions of this Court involving zoning regulations which carry out aesthetic goals. Such regulations have been upheld even though incidental limits are imposed on First Amendment rights.

4. Finally, *amici* believe abstention would have been proper in this case. The lower courts' failure to abstain gives sanction to an unseemly race to the courthouse engaged in by appellees, and creates an anomalous situation in which the Renton ordinance has been struck down in federal court while an almost identical ordinance of the sister city of Seattle has been upheld by the highest state court.

ARGUMENT

I. THIS CASE PRESENTS IMPORTANT ISSUES WHICH REQUIRE PLENARY HEARING AND DECISION BY THIS COURT

A. Introduction

This case is one of great national importance. All across the country, cities, counties and states have been engaged in comprehensive efforts to improve the quality of life for people.¹⁵ Land use planning, environmental laws and historic preservation are but means to achieve the goal of making communities desirable places to live.¹⁶

It is well settled that under the police power, a city can zone to protect its neighborhoods and promote "public safety, public health, morality, peace and quiet, law and order." *Berman v. Parker*, 348 U.S. 26, 32 (1954).¹⁶

¹⁵ The reference to "cities" in this brief should be read as including other general purpose units of state and local governments, many of which have adopted zoning ordinances similar to that in question. F. Strom, *Zoning Control of Sex Businesses* 1 (1977).

¹⁶ The reason for this government effort is plain. As this Court noted in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926):

As part of this effort to improve the quality of life, cities have attempted to limit the adverse impact on the land values and quality of life of the surrounding community caused by the proliferating "adult" entertainment industry. Anyone who has visited a major city in the last few years is well aware that "adult" entertainment uses affect the general quality of life.¹⁷ Since the Court's decision in *Young*, many cities have enacted zoning ordinances patterned after the Detroit ordinance upheld by the Court in that case.¹⁸

"Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities."

Local land use regulations rationally related to legitimate governmental objectives and which do not violate the just compensation clause are usually sustained. Thus, *Berman, supra*, held that it was within the power of the legislative branch to take into account aesthetic as well as health considerations. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning laws not invalid exercise of police power). See also *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) (comprehensive plan preserving structures of historic or aesthetic interest not discriminatory nor a "taking"); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding ordinance limiting land use to one-family dwellings).

¹⁷ Clor, *Public Morality and Free Expression: The Judicial Search for Principles of Reconciliation*, 28 Hastings L.J. 1305, 1306 (1977).

¹⁸ Marcus, *Zoning Obscenity: Or, the Moral Politics of Porn*, 27 Buffalo L. Rev. 1 (1978). See *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), sustaining zoning ordinance restricting location of adult theaters; see also, *City of Norfolk v. Tiny House, Inc.-Mom's Restaurant*, 222 Va. 414, 218 S.E.2d 836 (1981), upholding zoning ordinance requiring a use permit for adult uses within 1000 feet of other adult uses; *City of Minot v. Central Ave News, Inc.*, 308 N.W.2d 851 (N.D. 1981), sustaining restriction on location of adult entertainment center where there was substantial area available for operating such a center; *Contrast, Marco Lounge, Inc. v. City of Federal Heights*, 625 P.2d 982 (Colo. 1981), striking down zoning ordinance confining adult entertainment to "entertainment districts" which were not provided for within city limits.

In *Young*, the Court approved a zoning ordinance that treated "adult motion picture theaters" as a "regulated use" and limited the area in Detroit in which such theaters could be located. The Court's holding, 427 U.S. at 62—"The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances"—carefully balanced a concern with the communal quality of city life with the interest in preserving First Amendment values and protecting the free dissemination of ideas.

Relying on the decision in *Young*, and concerned with the spread of enterprises which have contributed to neighborhood deterioration and blight, many cities have enacted laws zoning the location of "adult" motion picture theaters. Although these ordinances have often been upheld by state supreme courts, only one has been sustained by a federal court of appeals, and several others have been struck down by federal courts of appeals.¹⁹ The conflict in these decisions demonstrates confusion concerning the meaning and effect of the *Young* decision. At this point, cities and counties need further guidance from the Court as to how they may protect their neighborhoods, family life, and children from urban blight without transgressing First Amendment limitations.

The need for guidance is illustrated by the background of this case. The city of Renton, as part of its overall effort to maintain a desirable and wholesome community, began to study the regulation of "adult" entertainment land uses. Renton had no "adult" motion picture theaters but was aware that such uses, unregulated, had had adverse impacts elsewhere, on neighborhoods, on children, and on property values. Therefore, the Renton City Council, its Planning and Development Committee, and the office of the City's acting Planning Director under-

¹⁹ See *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), and cases cited in appellants' Jurisdictional Statement, p. 12, fn. 23, 24, 25, 26.

took an extensive study of the problem. After soliciting information from the community, and holding public hearings, the Council drafted an ordinance patterned on that upheld by this Court in *Young*.²⁰ Yet, though the ordinance was sustained by the federal district court, it was struck down by the Ninth Circuit as lacking substantial government interest and suppressive of free speech.

B. The Ninth Circuit Opinion Below Leaves Doubt As To What Evidence of the Adverse Effects of "Adult" Theaters Would Meet Its Test of Constitutionality

In its opinion, the Ninth Circuit acknowledged that Renton was not required to permit the operation of "adult" theaters in order to document their effects in its own community before undertaking their regulation. But the court left wholly undefined the nature of the evidence necessary to substantiate a restriction on such land use. Playtime's motion to affirm suggests that Renton had a duty to undertake an investigation of circumstances in other cities to determine whether their environment was sufficiently similar to that of Renton to make their experiences relevant. Such a requirement is obviously onerous and impractical, in terms of financial and personnel resources, for a small community. In *Young*, 427 U.S. at 55, this Court placed reliance on several scholarly and empirical studies in upholding Detroit's restriction on "adult" entertainment land uses. Yet the Ninth Circuit's opinion appears to preclude similar reliance by a city seeking to frame a reasonable standard for the permitted operation of "adult" theaters.

Moreover, the Ninth Circuit, while disapproving the District Court's finding of the extent of the land left available by Renton's plan for "adult" exhibitors, offers no guidance concerning the geographical extent to which such use must be permitted, either in terms of actual acreage, or in terms of a percentage of the area of the

²⁰ See Appendix to Jurisdictional Statement of Appellants, App. O, P, Q, R and S for the Detroit and Seattle Ordinances.

city as a whole, or of the area open to entertainment uses generally.

This Court, in *Young*, made it plain that some restriction on the freedom to exhibit "adult" movies is constitutionally permissible in the interest of preserving other important community values including "the present and future character of its neighborhoods." 427 U.S. at 72. Cities urgently need more specific guidance, so that they may tailor such restrictions to community needs without running afoul of the First Amendment.²¹

C. The Decision Below is Inconsistent with this Court's Opinion in *Young v. American Mini Theatres, Inc.*

In ruling that the City of Renton had not shown a substantial governmental interest in restricting "adult" entertainment, and that Renton had "not shown that it was not motivated by a desire to suppress speech based on its content,"²² the Ninth Circuit reached a result inconsistent with the Court's test in *Young*.

²¹ The Ninth Circuit also rejected a similar ordinance in *Kuzinich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982), because of "very little evidence bearing on the concentration of adult enterprises," despite the county's expressed concern for complaints about traffic and littering. And in *Ebel v. City of Corona*, 698 F.2d 390 (9th Cir. 1983), the court rejected the findings of the federal district court that alternative sites for adult bookstores existed in Corona and remanded for "proof of likelihood of some harm." Cities have cause to wonder whether *any* ordinance and *any* evidence would meet the Ninth Circuit standards.

²² The Ninth Circuit opinion errs in "inferring that a motivating factor behind the ordinance was suppression of the content of the speech." 748 F.2d at 537. To reach its result, the court glossed over the findings of the ordinance by finding a motive for the ordinance in expressions of dislike for the subject matter. Undertaking an inquiry on the legislative motive is "a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 384 (1968). It is especially hazardous in the context of public meetings where all and sundry are invited to address their government. To infer an intent on the part of the City of Renton to suppress First Amendment rights from such statements is illogical and, on the facts of this case, wrong.

The Ninth Circuit's opinion is peppered with references to *Young*, but minimizes this Court's holding in that case that the interests furthered by such an ordinance are important and substantial. As Justice Stevens, speaking for this Court, said: "[T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded the highest respect." 427 U.S. at 71.²³ The Ninth Circuit, by contrast, glossed over Renton's substantial interest in preserving the quality of life in the community, and focused instead on the fact that Renton "does not solve the problem in the same manner" as Seattle and Detroit. Detroit, for example, required dispersal of adult theaters, whereas the ordinance in Renton would result in their concentration. But, in *Young*, this Court gave no indication that the specific solution adopted by Detroit was the only acceptable way to deal with the problem. The opinion drew no such line. To the contrary, the Court intended that cities would be free to experiment with solutions adapted to their own communities. The opinion specifically noted that:

" . . . [W]e have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city." 427 U.S. at 62.

The Court added:

"It is not our function to appraise the wisdom of its [the Detroit City Council's] decision to require adult theaters to be separated rather than concentrated in the same areas [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 71.

²³ See also concurring opinion of Justice Powell: "Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values". *Id.* at 80.

The Ninth Circuit opinion also ignores the reasoning in Justice Powell's concurring opinion in *Young*.²⁴ Justice Powell termed it "undeniable" that "a zoning ordinance that merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression."²⁵ *Young*, 427 U.S. at 81, fn 4. He also stated ". . . the dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind." Rather, it involves only the government's right to "tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated."²⁶

²⁴ Justice Powell pointed out that "zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.'" *Young*, 427 U.S. at 80, citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974).

²⁵ "The burden . . . is no different from that imposed by more common ordinances that restrict to commercial zones of a city movie theaters generally as well as other types of business presenting similar traffic, parking, safety, or noise problems. After a half century of sustaining traditional zoning of this kind, there is no reason to believe this Court would invalidate such an ordinance as violative of the First Amendment. The only difference between such an ordinance and the Detroit ordinance lies in the reasons for regulating the location of adult theaters. The special public interest that supports this ordinance is certainly as substantial as the interests that support the normal area zoning to which all movie theaters, like other commercial establishments, long have been subject." *Id.* at 80, fn 3.

²⁶ *Id.* at 81, fn. 6. Regulations have been upheld which ban demonstrations in or near court houses, *Grayned v. City of Rockford*, 408 U.S. 104 (1972); limit the use of sound trucks, *Kovacs v. Cooper*, 336 U.S. 77 (1949), *reh'g denied*, 336 U.S. 921 (1949); and ban overlapping parades, *Cox v. New Hampshire*, 312 U.S. 569 (1941).

Like Detroit, Renton has "silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view ['adult' films.]" *Young*, concurring opinion of Justice Powell at 78-79. The Renton ordinance is addressed only to the *places* at which this type of expression may be presented, a restriction that does not interfere with content.²⁷

D. Unlike the Decision in *Young*, the Ninth Circuit Result Establishes an Impossible Standard

The Ninth Circuit opinion leaves cities with a Hobson's choice. As required by the court below, there are only two ways for a city which lacks "adult" theaters to gather evidence on secondary harms from such enterprises. The city may permit entry of such theaters and allow the decay which has accompanied them in many other cities to set in, or the city may commission studies and hire experts to predict the effects of "adult" theaters on its community.

To wait for the harm to occur is exactly what wise urban planning seeks to avoid. Nor is waiting mandated by any decision of this Court. The very purpose of city planning is to foresee and prevent the evils which can arise from conflicting or potentially harmful land uses rather than to permit their occurrence before seeking a remedy. In the area of planning and zoning, cities learn from the

²⁷ In addition to the area available for their exhibition in Renton itself and in neighboring Seattle, the movies in question are available as video cassettes at three video rental and sale establishments within the City of Renton: Mary's Commodore Video Rentals, Sunset Video, and Star Video.

Also, an estimated 20 percent of the U.S. adult population own VCR machines. As a recent article in *Newsweek* noted, these films are widely available. A *Newsweek* poll indicates nine percent of all Americans bought or rented an X-rated cassette within the last year. *Newsweek*, March 18, 1985, at page 61. Such X-rated films are also available by mailing according to advertisements in such magazines as *Hustler* and *Oui*.

experience of other cities. Indeed, model zoning codes are promulgated for that very purpose.²⁸ The city need not await deterioration to act. *Genusa v. City of Peoria*, 619 F.2d 1203, 1211 (7th Cir. 1980). The Renton ordinance, like those in many cities, was designed to protect and preserve the quality of its neighborhoods and commercial districts from foreseeable blight. To await the advent of adverse effects in each community before taking action is akin to insisting that Skyline Towers must collapse in one's community before building regulations can be changed.

Under the Ninth Circuit's decision, the only alternative to passive acceptance of urban blight would be to commission a study of the potential effects of adult theaters in each concerned community. Such a study, however, would be not only costly and time consuming for a small city like Renton, but also redundant. Any such study would be cumulative of existing studies which predict the potential harmful effects of "adult" entertainment uses based on the opinions of experts and the experience of other cities.²⁹

Instead, Renton chose the direct course. As stated in the ordinance, the Council relied on published studies and on the experience of other cities.³⁰ Significantly, the Council gave special consideration to the situations in Seattle and Tacoma, cities which are located in the same metropolitan area as Renton itself. The opinion of the Ninth Circuit supplies no rationale for rejecting the rele-

²⁸ Nichols, *Cyc. Legal Forms*, §§ 9.5026 et seq.; F. Strom, *Zoning Control of Sex Businesses* (1977).

²⁹ For example, in *Young*, this Court referred to "the opinion of urban planners and real estate experts" that the concentration of adult uses in the same neighborhood "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere." 427 U.S. at 55.

³⁰ Appendix to Jurisdictional Statement, App. M and N.

vance in Renton of the adverse effects of "adult" entertainment uses experienced in Seattle, Tacoma or Detroit.

E. The Ninth Circuit Decision is Inconsistent with Other Opinions of this Court

The Ninth Circuit decision, moreover, is inconsistent with other opinions of this Court. In *Los Angeles v. Taxpayers for Vincent*, — U.S. —, 104 S. Ct. 2118 (1984), this Court, reversing the Ninth Circuit, upheld an ordinance which affected the First Amendment rights of those wishing to post signs on public property.³¹ The Court concluded that prohibiting the posting of political and other signs on utility poles did not significantly compromise First Amendment values. The opinion found it well settled that the state may legitimately exercise its police powers to advance aesthetic values. *Los Angeles v. Taxpayers for Vincent*, *supra*, 104 S. Ct. at 2129.³² If a city, for aesthetic purposes, may zone land uses connected with such important societal values as communication of political ideas, the same authority clearly should extend to uses, akin to obscenity, which lie at the fringes of First Amendment protection.

II. THE NINTH CIRCUIT'S FAILURE TO ABSTAIN LED TO AN ANOMALOUS RESULT

The decision below presents another serious problem which *amici* wish to call to the Court's attention but which has not been raised by appellant in its jurisdictional statement. The Ninth Circuit ruled, without explanation, that "abstention is inappropriate in this case."

Without questioning appellants' decision not to present the abstention issue to this Court, *amici* would point out that it offers another reason for the Court to take

³¹ See also *Metromedia, Inc. v. City of San Diego*, 458 U.S. 490 (1981).

³² See also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); and *Berman v. Parker*, 348 U.S. 26 (1954).

jurisdiction in this case. The First Amendment standards set forth by this Court in *Young* apply to all courts in this country, whether state or federal. Yet here two courts, one state and one federal, both with jurisdiction over events in the state of Washington, arrived at diametrically opposite decisions on virtually indistinguishable facts. The Supreme Court of Washington in its decision in *Northend Cinema v. City of Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978), upheld a Seattle "adult" motion picture ordinance limiting the area for such uses, in a city of nearly half a million, to an area of approximately 250 acres. The Ninth Circuit, by contrast, struck down the Renton ordinance, which left an area twice as large as Seattle's available for "adult" theaters. Such diverse results based on essentially similar facts can only encourage a race to the courthouse in search of a favorable forum.

Thus, in this case Playtime filed a pre-enforcement challenge in the federal court before even completing its purchase of the theater. Playtime's preemptive strike in federal court occurred before the city even knew of the plans to show "adult" movies, and obviously before the city could file an enforcement proceeding in state court. Such tactics can also be used by other theaters all across the country.³³ Without abstention by the federal courts, the result is to oust state court jurisdiction and to undermine this Court's oft-stated doctrine of deference to appropriate state tribunals. Where a state court has pre-

³³ This is emphasized by the fact that Playtime Theatres was one of the unsuccessful litigants in the *Northend Cinema* case in which the Supreme Court of Washington upheld the Seattle ordinance. Since then, Playtime has consistently filed its litigation in federal court. *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980), *aff'd* 454 U.S. 1022 (1981); *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984), *app. pending*, U.S. Sup. Ct. Nos. 84-28, 84-143 (argued Feb. 20, 1985); *Playtime Theatres, Inc. v. City of Tacoma*, 9th Cir., No. 81-3544 (unpublished decision, Oct. 25, 1982); *Playtime Theatres, Inc. v. City of Bremerton*, U.S. D.C., W.D. Wash., No. C-81-193V.

viously ruled on the validity of laws regulating the location of "adult" theaters, failure of federal courts to abstain can result in opposite rules of law being followed, as has occurred here. This is unseemly and anomalous. The effect is "one rule in Athens and another rule in Rome."³⁴

This pattern suggests to *amici* that the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971), should apply to cases such as this, where vital state interests are involved, and state law does not bar the interposition of the constitutional claim. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, — U.S. —, 102 S.Ct. 2515, 2521 (1982). The outcome of virtually identical cases from communities located side by side should not depend on an unseemly legal scramble for a sympathetic court.

CONCLUSION

In the light of the Ninth Circuit's opinion, further guidance is needed by communities struggling with a problem of significant societal dimensions, involving substantial neighborhood deterioration. Thus *amici* urge the Court to grant appellants' request for plenary hearing.

Respectfully submitted,

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³⁴ *Laird v. Tatum*, Memorandum of Justice Rehnquist, 409 U.S. 824 (1972).

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IN THE
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OCTOBER TERM, 1984

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a Washington corporation, *et al.*,
Appellees.

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for the Ninth Circuit

MOTION TO FILE BRIEF *AMICUS CURIAE*
AND BRIEF *AMICUS CURIAE*
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THE NATIONAL ASSOCIATION OF COUNTIES,
THE INTERNATIONAL CITY
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THE UNITED STATES CONFERENCE OF MAYORS,
THE COUNCIL OF STATE GOVERNMENTS,
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IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

May a city government require that "adult" motion picture theaters not be placed where they would adversely affect children, schools, churches, property values and the quality of life, but instead be located in more suitable commercial areas?

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**MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
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THE UNITED STATES CONFERENCE OF MAYORS,
THE COUNCIL OF STATE GOVERNMENTS,
AND THE AMERICAN PLANNING ASSOCIATION
IN SUPPORT OF APPELLANTS**

Pursuant to Rule 36 of the Rules of the Court, *amici* respectfully move this Court for leave to file the attached brief *amicus curiae* in support of appellants City of Renton and its officials.*

The *amici* are organizations whose members include state, city and county governments and officials located

* Appellants have consented to the filing of this brief. Appellees have not.

throughout the United States, and an organization of city and regional planners and officials concerned with planning and orderly urban development.

The question in this case, whether a city government may require that "adult" motion picture theaters be located where they would not adversely affect the quality of community life, is one of great importance to *amici* and their members. This question vitally affects the power of government to regulate and plan in the public interest by limiting the permissible locations of "adult" entertainment uses.

Subsequent to this Court's decision in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), *reh'g denied*, 429 U.S. 873 (1976), city officials across the nation, acting under the guidance of the *Young* case, have attempted to reconcile First Amendment values with traditional zoning principles. However, decisions of the Ninth Circuit and other federal courts of appeals that have overturned ordinances essentially similar to the ones upheld in *Young*, have left local governments virtually crippled in dealing with the adverse affects of the "adult" entertainment industry. For these reasons *amici* are deeply concerned over the outcome of this case and are submitting this brief to assist the Court in its consideration of the matter.

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IN SUPPORT OF APPELLANTS**

INTEREST OF THE AMICI

The interest of the *amici* is set forth in the motion for leave to file this brief.

STATEMENT OF THE CASE

The *amici* agree with the statement of the case submitted by the City of Renton. However, *amici* also wish to emphasize specific important facts.

Renton is typical of many cities¹ throughout the country in its efforts to engage in comprehensive planning. Laws to provide a pleasant environment, to protect health, to promote orderly growth, and to enhance the public safety are the very stuff of local and state governments. Cities, counties and states use zoning regulations as one tool to accomplish the goal of making communities desirable places to live.²

In April, 1965, Renton adopted its first comprehensive plan.³ Among its purposes are to "improve the physical and social environment of the city as a setting for human activities—to make it more functional, beautiful, decent, healthful, interesting and efficient."⁴

¹ The references to "cities" in this brief should be read as including other general purpose units of state and local governments, many of which have adopted zoning ordinances or statutes similar to that in question. F. Strom, *Zoning Control of Sex Businesses* 1 (1977).

² Local governments may zone for the public welfare. A city may strive to be "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Berman v. Parker*, 348 U.S. 26 (1954); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). See Comment: *Zoning, Aesthetics and the First Amendment*, 64 Col. L. Rev. 81, 82 (1964).

³ The plan states Renton's planning goals as follows: "The overriding consideration is to promote public safety, welfare, and interest. Additional factors to be considered (not in order of priority) are preservation of property rights, protection of life and property, equal opportunities, public interests prevailing over private interests, and economic and social benefits." City of Renton, *Comprehensive Plan Compendium* 3, January 1985 (available at City Hall, Renton, Washington).

⁴ Other purposes are: "To insure acceptable levels of access, utilities and other public services to future growth and development[;]

As part of its comprehensive plan, Renton adopted area-specific plans including one for the central area of the city. That plan was developed and refined "through a process of field analysis, data gathering and public input at two public meetings and one public hearing" between 1979 and 1982.⁵ The central downtown area was conceived as one providing for "sufficient retail services to accommodate the projected residential and employment population of the area."⁶ It incorporates a "variety of housing opportunities, including single family and multiple family housing" for close-in living, and church and school uses which are part of the neighborhood.⁷ Development and redevelopment were planned

To promote the public interest, and the interest of the City at large[;] To facilitate the democratic determination and implementation of City policies and developments; To effect coordination in development; To inject long-range considerations into the determination of short-range actions; and To provide professional and technical knowledge in the decisions affecting development of the City." City of Renton, *Comprehensive Plan Compendium*, *supra* at 3.

⁵ City of Renton, *Comprehensive Plan Compendium*, *supra* at 61. In adopting specific ordinances, which form part of the comprehensive plan, the usual local government process of study, committee meetings, council meetings and public hearings was followed. For example, before the Council adopted the "adult" theater ordinance in question, the Planning and Development Committee held at least six meetings. Jurisdictional Statement of Appellants, at 5, fn. 4.

⁶ City of Renton, *Comprehensive Plan Compendium*, *supra* at 62.

⁷ *Id.* at 61. The Washington Superior Court said that Renton has retained much of its original downtown core area which contains not only "commercial uses, but single residences and church and school uses which have been, and continue to be, a part of a neighborhood." Memorandum Decision, March 9, 1984, *City of Renton v. Playtime Theatres, Inc.*, Superior Court for The State of Washington for King County No. 82-2-02344-2, SLLC App. pp. 5a-6a. (References in this form are to the Appendix to this brief filed by the State and Local Legal Center in support of *amici*.) The state court judge also noted that "[s]ubstantial recent investment in amenities is clearly evident and within a very close proximity of the theatre,

along the Cedar River to maintain a recreational flavor in that portion of the community.⁸

As part of the effort to maintain the central area of the city as a good place to live, Renton adopted a number of zoning ordinances,⁹ including one adopted in April, 1981, dealing with "adult" motion picture theaters. Patterned after the Detroit ordinance approved by this Court in *Young v. American Mini Theaters*, 427 U.S. 50 (1976),¹⁰ the ordinance attempts to prevent the operation of "adult" motion picture theaters in areas close to schools, residences, churches and public parks.¹¹ It was

residences, businesses, schools and churches, there are also municipal buildings and a series of waterfront parks and recreational and civic use facilities . . ." *Id.* at 6a.

⁸ City of Renton, *Comprehensive Plan Compendium*, *supra* at 63.

⁹ *Id.* at 1. See also Renton, Wash., Code, Chapter 7 of Title 4, Zoning, §§ 4-701 *et seq.* (available at Renton City Hall, Renton, Washington).

¹⁰ The Renton ordinance, unlike the Detroit ordinance, provides only for civil, not criminal, penalties.

¹¹ The first ordinance, adopted in April, 1981, contained the following definition:

"'Adult Motion Picture Theatre'. An enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' as hereafter defined, for observation by patrons therein."

The ordinance prohibited "adult" motion picture theaters within 1000 feet of any residential zone or any single family or multiple family use, or church or any public park or park zone. It also prohibited such use within one mile of any public or private school. App. L, 79a. This latter provision was amended in May, 1982 to prohibit "adult" theatre uses within 1000 feet of any school, thus expanding the area available for such entertainment facilities. App. M, 87a. The amended ordinance also clarified the term "used" by defining it as

"a continuing course of conduct of exhibiting 'specific [specified?] sexual activities' and 'specified anatomical areas' in a manner which appeals to a prurient interest." *Ibid.*

adopted after almost a year of study, which included public hearings at which the city council heard testimony and reviewed exhibits indicating the potential adverse effects of "adult" entertainment uses on property values and the social climate of business and residential areas of the city.

The ordinance, which expressly relied on the known adverse effects of "adult" motion picture theatres on neighborhoods in Seattle, Detroit and other cities, was adopted before any such use was established or, as far as anyone knew, contemplated in Renton itself.

The District Court found that, under the ordinance, five hundred and twenty acres, or approximately five percent of the city's total land area, remained available for "adult" motion picture use. The available land, the Valley Planning Area, is "a developing area of industrial, commercial, and office uses." It is to be "developed with a diversity of high quality industrial, commercial and office uses" and "should be the principal growth area for these uses" within the city.¹² It is adjacent to a freeway interchange and is within 15 minutes driving distance of any area in Renton.

In January, 1982, Playtime purchased the Renton theater, knowing that it was within an area proscribed by the ordinance, for the admitted purpose of exhibiting "adult" motion pictures. Before completing its purchase, Playtime filed this action, on January 20, 1982, asking that the ordinance be declared unconstitutional and that its enforcement be permanently enjoined.¹³ On January

¹² City of Renton, *Comprehensive Plan Compendium*, *supra* at 31. Only one small portion is designated for heavy industrial use. *Id.* at 47.

¹³ A month later, in February, 1982, Renton brought suit in state court seeking a declaratory judgment that the ordinance was constitutional on its face, and alleging that an actual dispute existed because of Playtime's pending federal lawsuit asserting that the

11, 1983, the district court, adopting the findings of a magistrate, granted a preliminary injunction. App. A, 35a-36a.

On February 17, 1983, the district court denied the permanent injunction. App. 32a. Finding that five hundred and twenty acres were available as potential sites for adult theater use, the court concluded that the ordinance did not substantially restrict interests protected by the First Amendment. The court also held that the city was not required to show specific adverse impact on Renton from the operation of adult theaters, but could rely on the experiences of other cities. Lastly, the court found that the purposes of the ordinance were unrelated to the suppression of speech and that the restrictions it imposed were no greater than necessary to further the governmental interests at stake.¹⁴

Playtime appealed, and the Ninth Circuit reversed. The court of appeals declared that abstention was inappropriate and that it had an obligation to scrutinize strictly zoning decisions that infringe First Amendment rights. It disagreed with the district court as to the availability of land and concluded that the limitation on

ordinance was unconstitutional. Renton also moved to dismiss Playtime's federal action on grounds of abstention. The district court subsequently ruled that abstention was improper. App. A, 4a.

¹⁴ The state court complaint was later amended by Renton to seek abatement of the operation of the theater. The Superior Court judge used an advisory jury drawn from the King County jury pool, which represented a cross-section of individuals and backgrounds, to consider ten films stipulated to be typical of those presented at the Renton theater by Playtime. Mem. Dec. Sup. Ct. Wash., SLCC App. pp. 15a-29a. The court applied the high standard of proof, i.e., clear, cogent and convincing evidence, used in *Cooper v. Mitchell Brothers' Santa Ana Theatre*, 454 U.S. 90 (1981), *reh'g denied*, 456 U.S. 920 (1982), in determining that Playtime's exhibition of the films submitted to the court as typical constituted "a nuisance per se, and an 'adult motion picture theatre' as defined" in the ordinance and should be abated. Mem. Dec. Sup. Ct. Wash., SLLC App., p. 40a.

the area allowed for "adult" theater uses would cause a substantial restriction of freedom of speech. Using the four-part standard of review set forth in *United States v. O'Brien*, 391 U.S. 367 (1968),¹⁵ the Ninth Circuit subjected the district court's decision to *de novo* review as involving mixed questions of fact and law.

The court of appeals conceded that, under the *O'Brien* test, the regulation was within Renton's constitutional power, but stated that Renton had not shown a substantial governmental interest in enacting the ordinance, as the ordinance itself contained only conclusory statements. The Ninth Circuit also found that Renton did not meet the third prong of the *O'Brien* test, as Renton "has not proved that the regulation is unrelated to the suppression of speech." The court never reached the fourth prong of the test to determine whether "the incidental restriction on First Amendment freedom is no greater than essential to further [Renton's governmental] interest."

SUMMARY OF ARGUMENT

1. "Adult" entertainment uses have an adverse impact on land values, the quality of life and the social environment of cities. To limit this impact, while simultaneously leaving ample space free for "adult" theaters, Renton and other cities have enacted zoning laws which regulate the permissible locations of "adult" entertainment uses. Such laws accord with this Court's decision in *Young v. American Mini Theatres*, 427 U.S. 50 (1976). There, the Court recognized that such regulation

¹⁵ The test is: "A governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. at 377 (1968).

could properly be based on the content of "adult" entertainment and that dissemination of material bordering on pornography receives less constitutional protection than dissemination of ideas of social and political significance. The decision below is inconsistent with *Young* and frustrates the efforts of cities to maintain the social environment while protecting First Amendment rights by leaving ample land free for "adult" entertainment.

2. The Ninth Circuit did not allow Renton to rely on the extensive experience of other cities when enacting its zoning ordinance. Under the court's decision, Renton is left with two choices. It can permit the decay accompanying unregulated placement of "adult" theaters to set in before remediation, or it can commission expert studies that will show that decay will occur in Renton no less than in other cities.

Both choices are insupportable. To allow decay to occur is directly contrary to the purposes of city planning and is required by no decision of this Court. To commission studies instead of relying on the widespread experience of other communities is onerously expensive for small communities such as Renton, is redundant because the studies would simply duplicate prior learning developed elsewhere, conflicts with the common tradition whereby cities learn from each other's experiences, and is inconsistent with *Young*, in which the Court upheld a Detroit ordinance based on experience in other cities.

3. The plurality and concurrence in *Young* both stressed that cities have a crucial interest in maintaining the quality of urban life. The Court equally made clear that cities can experiment with reasonable methods for dealing with the problems created by "adult" entertainment uses: cities can require dispersal of such uses, as Detroit did, or can require their concentration.

The Ninth Circuit, however, paid small heed to cities' critical interest in preserving the social environment, and struck down Renton's ordinance because it required con-

centration rather than dispersal of "adult" uses. The Court's opinion is therefore inconsistent with *Young* and is erroneous.

4. The Ninth Circuit claimed Renton had failed to prove it was not motivated by a desire to suppress speech; the court therefore assumed Renton *did* have such a motive. In so ruling, the court glossed over legislative findings by the city council that unrestrained placement of "adult" theaters will cause serious adverse consequences to the community.

The decision was erroneous. As this Court has held, inquiry into legislative motive is "a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). It is especially hazardous where, as here, the context includes statements made at open public hearings by any members of the public who wished to speak.

The purpose of public hearings is not to make a record of legislators' views for purposes of constitutional adjudication. Rather, it is to permit all and sundry to exercise their First Amendment rights of speech and petition by directly addressing their government in a time-honored way. Those who speak are free to make statements that are rude, ill-conceived, divisive or plain wrong. By holding public hearings, legislators do not adopt the views of those who testify. To the contrary, legislators quickly become adept at listening to all points of view without being unduly influenced.

Furthermore, if only constitutionally sanitized statements were allowed at public hearings, as appears to be demanded by the Ninth Circuit's ruling, the result would be gross censorship. And if public hearings were not held for fear some members of the public might make statements that will later be used to impeach legislation, legislators would be deprived of sources of information needed when considering legislation.

5. The lower federal courts should have abstained in this case.

This Court has ruled that comity and deference must be shown to state tribunals when state civil litigation involves important local interests, and that abstention is also proper when a state suit is commenced before substantial proceedings have occurred in a prior federal suit. This case meets both these criteria. Furthermore, a failure to abstain here would sanction tactics by which businesses such as Playtime can vitiate the rules of comity and deference by filing preemptive federal suits before a city even knows an "adult" theater is being established.

In a prior case involving legally indistinguishable facts, from Renton's sister city of Seattle, the Supreme Court of Washington ruled the Seattle ordinance constitutional. *Northend Cinema v. City of Seattle*, 90 Wash.2d 709 (1978). Thus, by not abstaining, and then ruling against the Renton ordinance, the lower federal courts in this case have encouraged an unseemly race to the courthouse. The decision enables entrepreneurs like Playtime to avoid state courts by purchasing an establishment and immediately suing in federal court to enjoin an ordinance, before a city even knows of their plans to show "adult" movies. In this way, this Court's oft-stated rule of deference to state tribunals will be undermined, and different rules of law will prevail in sister communities—an unseemly and anomalous situation.

ARGUMENT

I. CITIES MUST PLAN AND ZONE TO PROTECT THE QUALITY OF LIFE

A. The Decision Below Cripples a City's Ability to Maintain the Viability of Community Life And Is Inconsistent With This Court's Decision in *Young v. American Mini Theatres*

To allow each use a place without infringing on the rights of others to enjoy "the city as a setting for human activities"—"functional, beautiful, decent, healthful, interesting and efficient"¹⁶—is the basic task of city planners. "Adult" entertainment uses affect this task because, as anyone who has visited a major city in the last few years is well aware, such uses affect the general social environment.¹⁷ Accordingly, Renton, like other cities, attempted to limit the adverse impact on land values and the quality of life caused by the proliferating "adult" entertainment industry.¹⁸

¹⁶ City of Renton, *Comprehensive Plan Compendium*, *supra* at 3.

¹⁷ Marcus, *Zoning Obscenity: Or, the Moral Politics of Porn*, 27 Buffalo L. Rev. 1 (1978). See *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), sustaining zoning ordinance restricting location of "adult" theaters; see also *City of Norfolk v. Tiny House, Inc.*, 222 Va. 414, 281 S.E.2d 836 (1981), upholding zoning ordinance requiring a use permit for "adult" uses within 1000 feet of other adult uses; *City of Minot v. Central Ave. News, Inc.*, 308 N.W.2d 851 (N.D. 1981), sustaining restriction on location of "adult" entertainment center where there was substantial area available for operating such a center. Compare *Marco Lounge, Inc. v. City of Federal Heights*, 625 P.2d 982 (Colo. 1981), striking down zoning ordinance confining "adult" entertainment to "entertainment districts" which were not provided for within city limits.

¹⁸ As the Washington Superior Court noted: "For a small commercial area, the impact of one theatre of this nature certainly can be deemed to alter the atmosphere of the neighborhood, is likely to affect property values, deter residents from remaining and adversely will impact criminal activity." Memorandum Decision, SLLC App., pp. 7a-8a.

Renton's efforts were in accord with the decision of this Court in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), *reh'g denied*, 429 U.S. 873 (1976). There, this Court approved a zoning ordinance that treated "adult motion picture theatres" as a "regulated use" and limited the area in Detroit in which such theaters could be located. The plurality expressly recognized that such regulation could be based on content, 427 U.S. at 70, and pointed out that there is a "less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance. . . ." *Young*, 427 U.S. at 61.¹⁹

The Court carefully balanced a concern for the communal quality of city life with the interest in preserving First Amendment values and protecting the free dissemination of ideas. The Court thus said: "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." 427 U.S. at 62.

Relying on the decision in *Young*, and concerned with the spread of enterprises which have contributed to neighborhood deterioration and blight, many cities have enacted zoning laws which regulate the location of "adult" motion picture theaters while simultaneously allowing ample space for many such movie houses.²⁰ Although these ordinances have often been upheld by state supreme

¹⁹ See also Clor, *Public Morality and Free Expression: The Judicial Search for Principles of Reconciliation*, 28 Hastings L.J. 1305, 1306 (1977); Toner, *Regulating Sex Businesses*, Am. Soc. Plan. Off., Rep. No. 327, p. 1 (1977).

²⁰ Appellant's brief reviews the factual evidence and demonstrates persuasively that Renton left ample land free for adult entertainment uses. See App. Br. at 29-36.

courts,²¹ only one has been sustained by a federal court of appeals,²² and several others, including Renton's, have been struck down by federal courts of appeals.²³ The decision below is inconsistent with *Young's* approval of city efforts to address the serious problems caused by the "adult" entertainment industry. Such decisions cripple cities in their efforts to maintain the quality of community life. This should not be. Under *Young*, cities may protect their neighborhoods, family life, and children from urban blight²⁴ while protecting First Amendment rights by allowing ample space for "adult" entertainment.

B. Cities Should Not Be Forced to Choose Between Permitting Decay Before Remediation and Undergoing the Expense of Commissioning Expert Studies That Predict Known Effects

The Ninth Circuit ruled that Renton could not justify its ordinance by relying on the experience of other cities that had found that the unregulated proliferation of "adult" theaters caused severe adverse secondary effects.

This ruling leaves cities with but "a small choice in rotten apples."²⁵ Under the decision below, there are only two ways for a city that lacks "adult" theaters to gather evidence on the secondary harms from such en-

²¹ E.g., *City of Norfolk v. Tiny House, Inc.*; *City of Minot v. Central Ave. News, Inc.*, *supra*.

²² See *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), sustaining zoning ordinance restricting location of "adult" theaters.

²³ *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1981); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982); *Fantasy Bookshop, Inc. v. City of Boston*, 652 F.2d 1115 (1st Cir. 1981); *Tovar v. Billmeyer*, 721 F.2d 1260 (9th Cir. 1983); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981); and *CLR Corp. v. Henline*, 702 F.2d 637 (6th Cir. 1983).

²⁴ "The protection of children from the negative effects of pornography, both as a development and safety concern, is surely an important state interest" Memorandum Decision, SLLC App., p. 11a. Cf. *New York v. Ferber*, 458 U.S. 747 (1982).

²⁵ W. Shakespeare: *The Taming of the Shrew*, I, i, 137.

terprises. The city may permit entry of such theaters and allow the decay which has accompanied them in many other cities to set in, or the city may commission studies and hire experts to predict the effects of "adult" theaters on its community.

To wait for the harm to occur is exactly what wise urban planning seeks to avoid: the very purpose of city planning is to foresee and prevent the evils which can arise from conflicting or potentially harmful land uses, rather than to permit their occurrence before seeking a remedy.²⁶ Nor did the Ninth Circuit point to any decision of this Court requiring cities to await the harm before remediation. The court could point to none because there is none.

The other alternative left to cities under the Ninth Circuit's decision—to commission a study of the potential effects of adult theaters in each concerned community—is no sounder and no more supportable. Such a study would be onerously costly and time consuming for a small city like Renton. It would also be redundant and cumulative of existing studies that already predict the harmful effects of "adult" entertainment uses based on the opinions of experts and the experiences of other cities.²⁷ Furthermore, requiring a study in each community would

²⁶ Justice Powell, concurring in *Young*, pointed out that "zoning, when used to preserve the character of specific areas of a city, is perhaps the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Young*, 427 U.S. at 80, citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974).

²⁷ See, e.g., Department of Metropolitan Development, Division of Planning, Indianapolis, Indiana, *Adult Entertainment Businesses in Indianapolis: An Analysis*, 1984; Planning Department, City of Phoenix, *Adult Business Study* (May 25, 1979); Department of City Planning, City of Los Angeles, *Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles* (City Plan Case No. 26, 475, June 1977).

thwart the normal planning and zoning process under which cities learn from the experience of other cities.²⁸ And requiring each city to conduct its own study is inconsistent with *Young* because that case upheld a Detroit ordinance that was based on reports and evidence concerning experiences in other cities.²⁹

Rather than await urban decay or conduct an elaborate and redundant study, Renton chose the direct course. The City Council relied on published studies and on the experience of other cities.³⁰ Significantly, the Council gave special consideration to the situations in Seattle and Tacoma, cities which are located in the same metropolitan area as Renton itself. The opinion of the Ninth Circuit supplies no rationale for rejecting the relevance to Renton of the adverse effects of "adult" entertainment uses in the sister cities of Seattle and Tacoma, or in Detroit. The opinion is plainly insupportable.

C. Cities Should Be Free to Experiment With Different Solutions to Important Urban Problems

Speaking for the majority in *Young*, Justice Stevens said that "the city's interest in attempting to preserve

²⁸ Model zoning codes are enacted for this very purpose. See, e.g., Nichols, *Cyc. Legal Forms* (1983); Toner, *Regulating Sex Businesses*, Am. Soc. Plan. Off., Rep. No. 327 (1977).

²⁹ As noted by Justice Powell in his concurring opinion in *Young*, 427 U.S. at 81: "That evidence consisted of reports and affidavits from sociologists and urban planning experts, as well as some laymen, on the cycle of decay that had been started in areas of other cities, and that could be expected in Detroit, from the influx and concentration of such establishments" (emphasis added). And as Justice Stevens stated in an analogous vein: "In the opinion of urban planners and real estate experts who supported the ordinances, the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere." 427 U.S. at 55.

³⁰ Appendix to Jurisdictional Statement, App. M and N.

the quality of urban life is one that must be accorded the highest respect." 427 U.S. at 71. Similarly, in his concurring opinion, Justice Powell said: "Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values." *Id.* at 80.

Despite these expressions from this Court, the Ninth Circuit paid little heed to Renton's substantial interest in preserving the quality of community life. The opinion focused instead on the fact that Renton "does not solve the problem in the same manner" as Seattle and Detroit. Detroit, for example, required dispersal of adult theaters, whereas the ordinance in Renton would result in their concentration. But in *Young*, this Court did not hold that the specific solution adopted by Detroit was the only acceptable way to deal with the problem. The opinion drew no such line. To the contrary, the Court expressly intended that cities would be free to experiment with solutions adapted to their own communities. The opinion specifically noted:

"[W]e have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, *either* by confining them to certain specified commercial zones *or* by requiring that they be dispersed throughout the city." *Id.* at 63-64. (Emphasis added.)

The Court added:

"It is not our function to appraise the wisdom of [the Detroit City Council's] decision to require adult theaters to be separated rather than concentrated in the same areas The city's interest in attempting to preserve the quality of urban life must be accorded high respect. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 71.³¹

³¹ See also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), Brandeis, J., dissenting:

The Court's holding in *Young* that cities are free to adopt varying solutions—which validates the action taken by Renton—draws further support from the reasoning in Justice Powell's concurring opinion in *Young*. Justice Powell termed it "undeniable" that "a zoning ordinance that merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression." *Young*, 427 U.S. at 81, fn. 4.³² He also correctly stated that cases of this type involve only the government's right to "tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated."³³

By ignoring the reasoning of both the plurality and concurring opinions, the Ninth Circuit violated *Young's* teaching that crucial city interests are at stake and municipalities can experiment with reasonable solutions to the problems.

"To stave experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

³² Justice Powell noted: "The burden . . . is no different from that imposed by more common ordinances that restrict to commercial zones of a city movie theaters generally as well as other types of businesses presenting similar traffic, parking, safety, or noise problems. After a half century of sustaining traditional zoning of this kind, there is no reason to believe this Court would invalidate such an ordinance as violative of the First Amendment. The only difference between such an ordinance and the Detroit ordinance lies in the reasons of regulating the location of adult theaters. The special public interest that supports this ordinance is certainly as substantial as the interests that support the normal area zoning to which all movie theaters, like other commercial establishments, long have been subject." *Young*, 427 U.S. at 80, fn. 3.

³³ *Id.* at 81, fn. 6.

II. ILLICIT MOTIVES SHOULD NOT BE ATTRIBUTED TO LEGISLATIVE BODIES ON THE BASIS OF STATEMENTS MADE BY CITIZENS AT PUBLIC HEARINGS

The Ninth Circuit said Renton "has not shown that it was not motivated by a desire to suppress *speech* based on its content." 748 F.2d at 537 (emphasis added). Because Renton did not prove the negative, the court inferred the opposite: that "a motivating factor . . . was suppression of the content of the speech." 748 F.2d at 537. In doing so, the court glossed over the city council's findings, expressed in the ordinance itself, that serious adverse consequences would flow from the unrestrained introduction of adult theaters in any location desired by profit-minded operators.

The Ninth Circuit committed error in impugning the motives of the Renton city council and then relying on other imputed motives as a ground for striking the statute. As this Court has pointed out, undertaking an inquiry into legislative motive is "a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 384 (1968).³⁴ It is especially hazardous where, as in this case, the context is one of public meetings at which all and sundry are invited to address their government. To infer an intent to suppress First Amendment rights from statements made at such meetings by members of the public will destroy the governmental and constitutional function of public hearings.

The very purpose of public hearings is to allow citizens access to leaders of government to state their views; the purpose is not to build a record for constitutional adjudication. In this country, we have a long tradition,

³⁴ "[I]nquiry into legislative motive is often an unsatisfactory venture. . . . What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it" (citing *United States v. O'Brien*); *Pacific Gas & Elec. v. St. Energy Resources Conserv.*, — U.S. —, 103 S.Ct. 1713, 1728 (1983).

antedating the founding of the Nation, of the people's exercise of the rights of free speech and petition by addressing governmental leaders at open meetings. Thus, if people in this country have a right to watch "adult" movies, a right that we freely concede, they surely have an equal right to attend public hearings and tell their city council of their objections to such movies.

Yet those very statements of objection, protected by the First Amendment, are here being used to attribute forbidden motives to the Renton city council. This attribution is improper because legislators have no practicable choice but to hear those statements or to hold no public meetings.³⁵ Adopting laws without any discussion by the public at open hearings would deny legislators information needed before decisions are made, while simultaneously thwarting the constitutional and governmental tradition of allowing citizens to be heard on matters vitally affecting their welfare. This correlative notion, that the constitutional right of citizens to petition government must also engender an obligation on the part of government to provide a forum for the citizenry, has been addressed by this Court.³⁶

Moreover, to permit only constitutionally sanitized statements at "public meetings" would not only be gross censorship, but a contradiction in terms. The Ninth Circuit apparently assumes that legislative leaders cannot hear from the public without adopting *in toto* the

³⁵ Washington and most other states require local governments to hold open meetings and public hearings on matters before them.

³⁶ See, e.g., *City of Madison, etc. v. Wis. Emp. Rel. Com'n*, 429 U.S. 167 (1976). One of the fortunate attributes of our intergovernmental system is that this constitutional protection is afforded to everyone, rational or irrational, commonsensical or nonsensical alike. The citizen critic, who tests the motives of government is esteemed in American society: "It is as much his duty to criticize as it is the official's duty to administer." *N.Y. Times v. Sullivan*, 376 U.S. 254, 282 (1964).

statements made by those who testify. It also assumes that, in hearing from the public, legislative bodies are creating a record of their own views. Anyone who had such an illusion would find it quickly dispelled by attendance at legislative hearings. Legislative hearings are not courts of law, and judicial rules do not apply. Citizens are perfectly free to urge positions that are ill-conceived, rude, divisive, or just plain constitutionally wrong. Legislators quickly become expert at listening to all witnesses without being unduly influenced. Thus, as the district court wisely concluded in this case:

"Predictably, some citizens expressed concerns reflecting their values which might be impermissible bases for justification of restrictions affecting first amendment interests. . . . The inclusion of these statements should not negate the legitimate, predominate concerns of the City Council nor lessen the value of the circumstantial evidence of adult land uses' effects in nearby cities." J.S. App. 31a.

III. THE NINTH CIRCUIT'S FAILURE TO ABSTAIN IS INCONSISTENT WITH THE DOCTRINE OF *YOUNGER v. HARRIS*

The Ninth Circuit, without explanation, affirmed the ruling of the district court that "abstention is inappropriate in this case." This ruling is inconsistent with the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny.³⁷

In *Younger v. Harris*, this Court ruled, in an oft-quoted passage, that federal court interference with ongoing state court criminal proceedings was prohibited by traditional equity principles as well as

³⁷ Appellant, although it did not directly present this issue for review, does maintain that the courts below erred in regard to abstention. App. Br. at 11, fn. 16. Given the quasi-jurisdictional nature of the abstention question, the Court could properly decide that abstention was required.

"the notion of 'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'our Federalism'"

Younger's doctrine of abstention since has been extended in two important ways, based upon these ideas of equity, comity, and federalism. This Court has decreed abstention with respect to ongoing state civil proceedings involving important state policies.³⁸ It has also required abstention where there is no ongoing state proceeding when a federal action is filed, but a state court suit is thereafter begun "before any proceedings of substance on the merits have taken place in federal court." *Hicks v. Miranda*, 422 U.S. 332, 349 (1975).

These principles converge in this case and demonstrate that the district court should have abstained from resolving Playtime's challenge to the ordinance after the city raised the identical issues in the state courts. There is no question that the case involves "the vindication of important state policies." *Middlesex County, supra*, 457 U.S. at 432. As the Court said in *Young v. American Mini-Theatres, supra*, "[t]he city's interest in attempting to preserve the quality of urban life is one that must be accorded the highest respect." 427 U.S. at 71. Nor had there been proceedings of substance in the federal courts when the state court proceedings began. Playtime filed this suit in federal court seeking injunctive relief even before completing its purchase of the Renton Theatre.

³⁸ See *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Juidice v. Vail*, 430 U.S. 327 (1977); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Moore v. Sims*, 442 U.S. 415 (1979); *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982).

Renton's own state court proceeding seeking declaratory and injunctive relief in support of the ordinance was filed only a month later. Such facts bring this case within the reasoning of *Hicks v. Miranda*, *supra*.

The effect of the Ninth Circuit's decision clearly discloses the problems which arise from the failure of the federal courts to abstain in this case. This Court itself sought, in *Miller v. California*, 413 U.S. 15 (1973), to return judgments about obscenity to the local level. That objective has been frustrated here. Furthermore, here, two courts, one state and one federal, both with jurisdiction over events in the state of Washington, have arrived at diametrically opposite decisions on closely similar facts. The Supreme Court of Washington, in *Northend Cinema v. City of Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978), *cert. denied sub nom. Apple Theatre, Inc. v. City of Seattle*, 441 U.S. 946 (1979), upheld a Seattle ordinance limiting "adult" motion picture uses to an area of approximately 250 acres in a city of nearly half a million people. The Ninth Circuit, by contrast, struck down the Renton ordinance, which left an area twice as large available for "adult" theaters in a city of less than 35,000. Such diverse results based on legally indistinguishable facts from sister communities can only encourage a race to the courthouse in search of a favorable forum.³⁹

Although conceding that *Younger v. Harris*, *supra*, should not require such a race, the Ninth Circuit nevertheless has encouraged such unseemly competition. For absent abstention, an entrepreneur will know that all he need do to avoid state courts is to purchase an establishment and sue immediately in federal court to enjoin enforcement of the ordinance—as was done here. Playtime's

³⁹ *Adult World Bookstore v. City of Fresno*, 758 F.2d 1348, 1350 (9th Cir. 1985); *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527, 533 (9th Cir. 1984).

preemptive strike in federal court occurred before the city even knew of the plans to show "adult" movies, and obviously before the city could file an enforcement proceeding in state court. The tactics used here, moreover, can also be used by theaters all across the country.⁴⁰ Abstention is particularly appropriate, as Justice O'Connor recently explained, where application of a local legislative enactment is questioned on constitutional grounds:

"[I]n cases involving First Amendment challenges to a state statute, abstention may be required 'in order to avoid unnecessary friction in federal-state relations [and] interference with important state functions . . .'" *Brockett v. Spokane Arcades, Inc.*, — U.S. —, 53 U.S.L.W. 4793, 4798 (1985), concurring opinion of Justice O'Connor.

Without abstention by the federal courts, state court jurisdiction will be ousted and this Court's oft-stated doctrine of deference to state tribunals will be undermined.

The *Younger* abstention doctrine should apply to cases such as this, where vital state interests are involved and state law does not bar the interposition of the constitutional claim.⁴¹

⁴⁰ Playtime Theatres was one of the unsuccessful litigants in the *Northend Cinema* case in which the Supreme Court of Washington upheld the Seattle ordinance. Since then, Playtime has consistently filed its litigation in federal court. *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980), *aff'd*, 454 U.S. 1022 (1981); *J.F. Distributors, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984), *rev'd*, — U.S. —, 53 U.S.L.W. 4793 (1985); *Playtime Theatres, Inc. v. City of Tacoma*, 9th Cir., No. 81-3544 (unpublished decision, Oct. 25, 1982); *Playtime Theatres, Inc. v. City of Bremerton*, U.S. D.C., W.D. Wash., No. C-81-193V.

⁴¹ We note that the Washington Superior Court Judge gave very thoughtful consideration to the First Amendment objections raised by Playtime. After reviewing the nature of the affected neighborhood and the deleterious consequences which would occur, she properly concluded that the exhibition of the films was a nuisance *per se* and constituted an "adult motion picture theatre" as defined in the Renton ordinance, and should be abated. Mem. Dec. Sup. Ct. Wash. SLLC App. p. 40a.

CONCLUSION

The decision below conflicts with cities' efforts to maintain viable communities, is inconsistent with the decision in *Young*, and violates the doctrine of *Younger v. Harris*. For all these reasons, it should be reversed.

Respectfully submitted,

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June 30, 1985

APPENDIX

APPENDIX

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

No. 82-2-02344-2

CITY OF RENTON,
a municipal corporation, *et al.*,
Plaintiffs,
vs.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Defendants.

MEMORANDUM DECISION

I. *PROCEDURAL POSTURE OF CASE.*

The Municipality of Renton in this cause seeks to enforce its ordinance as enacted and amended to abate as a nuisance, per se, the exhibition of certain sexually explicit films by defendant corporation in a theatre, located at 507 South Third Street, Renton, Washington. The defendants also sought to have Renton enjoined from enforcement of its ordinance and have the same declared unconstitutional in a U.S. Federal District Court of Western Washington Cause No. C82-59 M. *Playtime Theatres Inc. et al. v. City of Renton, et al.* After extensive evidentiary hearings, that challenge was denied by U.S. District Court Judge Walter F. McGovern and an appeal has been taken from the decision to the U.S. Ninth Circuit Court of Appeals and is presently pending.

This court has accorded deference to the U.S. District Court decision, has made the proceedings, including transcripts and certain exhibits in that cause a part of the record of this proceeding (Transcripts, exhibit #103; Map of the City Limits of the City of Renton, exhibit #104; Diagram of adult entertainment areas, exhibit #105; Aerial photograph showing adult entertainment areas, exhibit #103). These exhibits were admitted in connection with pre-trial issues, but were not submitted to the advisory jury.

Following extensive pre-trial discovery and preliminary issues resulting in a denial of summary judgment in favor of either party, the case came on for trial. An advisory jury was impaneled, pursuant to a ruling by the Court that the same was necessary for the establishing of a community standard in application of the *Miller vs. California* test. The advisory verdict was returned Monday, January 23, 1984 [Advisory Jury Verdict, Appendix 1].

II. NATURE OF THE APPLICABLE ORDINANCE ENACTMENT

The first task involves an analysis of the ordinances as enacted and amended, and the implications of the language utilized. (The Text of the Applicable Ordinances. Plaintiff's exhibits #68-71 are as follows, Appendix 2).

As a preliminary summary of current law, ordinances such as that enacted by Renton, will not be stricken as unconstitutionally impermissible restraints upon First Amendment protections, so long as certain tests may be met. Initially it should be observed, that obscene materials in films or otherwise are not afforded First Amendment protection. The problem is to determine which materials may and which may not be so classified and in addressing that classification, the governmental entity

has a burden of overcoming a presumption that the ordinance is invalid where freedom of expression is involved.

Reasonable regulations of time, place and manner of exhibitions of films will be permitted if the regulations are shown to be necessary to further significant governmental interests. Ordinances which effectively curtail total or substantial availability of theatres to the public or prevent entry of new theatres into a limited market, will not be sustained. This would be construed as a total suppression of vital speech interests and would operate as a prior restraint on the content of speech.

When a zoning ordinance infringes upon protected liberty, such as freedom of expression, it must necessarily be narrowly drawn to further a sufficiently substantial governmental interest and is subject to close scrutiny by the courts.

To justify a sufficiently substantial governmental interest, the City must produce some basis in fact and demonstrate that the factual basis was considered in passing the ordinance.

The ordinance in question is modeled after the Detroit ordinance in *Young v. American Mini Theatres*, 427 U.S. 50, 49 L.Ed. 2d 310 (1976), 96 Sup. Ct. 2440 relied upon by our own court and *Northend Cinema, Inc. v. The City of Seattle*, 90 Wn.2d 709, 585 P.2d 1153 (1978).

By way of some difference, in addition to the prohibition of the display of sexually explicit materials in a manner which appeals to prurient interests within 1,000 feet of certain family uses, the Renton ordinance originally prohibited displays within one mile of a public or private school (Ordinance 3526, Section II(a)(2)) and was subsequently reduced to 1,000 feet by amendment.

This court will not restate the long and tortuous history of the struggle for definition in this area of the

law since *Roth v. The United States*, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 Sup. Ct. 1304 (1957) and forward. Many of the cases involve the application of standards with criminal prosecutions being the primary remedy. In recent years, civil proceedings such as abatement for nuisance have been utilized. The decisions are replete with illustrations of the difficulty of obtaining consensus and agreement in individual cases. Literally hundreds of cases have wound their way through the state and federal systems with triers of fact at odds over the application of a subjective standard with appellate review of the final five U.S. Supreme Court Justices being required for finality to the challenge.

If there be a chameleon area of the law reflecting the tenor of the times and public mood, surely this is it. Any review of the development of the law of obscenity illustrates clearly the dramatic change in acceptability of materials and publications in film and mass communications. The shock over such books as "Ulysses" by James Joyce or D. H. Lawrence's "Lady Chatterley's Lover" seem remote, except that one must consider these celebrated legal challenges occurred with respect to these materials not so very long ago in this century. In a society which prizes liberty, tolerance and learning, we are loathe to compromise such values to the realm of easily abused and difficult to define censorship, lest our entire political structure be adversely and irrevocably impacted, as has been demonstrated in other nations where issues of public morality were subsumed by political repression.

At the same time, we must be mindful of competing interests advanced by a public entity on behalf of its citizenry to restrict the exercise of certain activities in support of other legitimate community goals. In assessing the reasonableness of the effort being made through its regulation, it should be recognized that a community has the right and obligation to safeguard its environment in many ways for the enhancement of the

quality of life for its citizens. The government has the right not only to maintain environmental standards of a physical nature, but in a broader moral, public safety and aesthetic environmental framework. Deference should be accorded a local community to set its own parameters unless it must be prevented from doing so because of constitutional prohibitions which must be enforced to safeguard the right of a minority not sharing the dominant community view. However, in matters of zoning generally, communities are given considerable latitude in the forms of their local management and development. It also is important to observe that there is no criminal prosecution involved in this proceeding, which would involve ultimate sanctions against an offender, including the loss of personal liberty, incarceration and the attendant extreme sanctions thereof.

It is important to keep in mind that this is a civil proceeding in which Renton seeks basically to restrict a particular geographical area and eliminate the showing of certain sexually explicit films within 1,000 feet of its churches, family residential areas and schools. The primary issue is, of course, to what extent is Renton able to do so and has it done so properly in this case.

III. RENTON

The City of Renton occupies the geographical area of roughly 15.6 square miles with a population of roughly 32,700 and has been incorporated since September 6, 1901. The Renton theatre with which we are concerned is located on a street which must be viewed as the core of the original and on-going commercial central area of the city. Unlike some communities which have been a product of rapid suburban growth only, superimposed on largely undeveloped or minimally developed rural areas, Renton has maintained much of its original downtown core area. This area not only contains commercial uses, but single residences and church and school uses which

have been, and continue to be, a part of a neighborhood. Substantial recent investment in amenities is clearly evident and within a very close proximity of the theatre, residences, businesses, schools and churches, there are also municipal buildings and a series of waterfront parks and recreational and civic use facilities basically within a walking distance. Renton High School and St. Anthony's Parish Parochial School are very nearby, within blocks. There is no issue in this case that the theatre is clearly within the zone which the City wishes to retain free of the showing of sexually explicit films which appeal to prurient interest in sex.

On a broader periphery, Renton is also home to a large airplane manufacturing facility, Boeing, has numerous emerging industrial parks and associated businesses developing in the valley area, the Southcenter shopping section, numerous smaller shopping centers, Longaeres Race Track, and of course, is relatively near the airport. All of these uses involve considerable numbers of people moving in and out of those areas daily, although this volume of traffic would not necessarily be attracted to the immediate location of this theatre, but of course, might well be attracted to it as a transient population if it were in operation.

Evidence was introduced which showed that at other locations in Renton shopping areas, the same films being shown by stipulation are readily available for sale or rental through video stores, primarily for viewing in residential privacy. There are no restrictions by the City as to this option. The availability of other specific geographic locations was not litigated in this proceeding. However, as a general matter, a permissible inference may be drawn that Renton does consist of a large geographical area and that elimination of the showing of sexually explicit films at the Renton Theatre will not foreclose availability elsewhere. It is the conclusion of this court that Renton did not purport and will not effect-

ively eliminate the display of sexually explicit films through the application of this ordinance, as in *Schad v. Mount Ephraim*, 452 U.S. 61 (1981) (total ban), *Keego Harbor Company v. City of Keego Harbor*, 657 F.2d 94 (6th Cir.) (1981) (effective ban, a 300 acre city with 3,000 people where there was no location within the confines of Keego Harbor that was *not* within 500 feet of a bar or other regulated use.)

The Renton ordinance simply disperses adult theatres from what it has determined to be an inappropriate location.

In considering whether Renton is entitled to have made such a determination as to this area, in pursuance of a compelling governmental interest which could not be achieved by any less restrictive means, this court would find that it has. It is constitutionally permissible to regulate businesses of this nature in the manner of the 1,000 foot type ordinance as decided in *Young v. American Mini Theatres, supra* and *Northend Cinema, supra*. Even if required to be narrowly drawn and required to further a substantial governmental interest, the ordinance is first, not designed to suppress a particular form of expression. It does regulate certain conduct on a reasonable time, place and manner basis to protect the quality of a neighborhood and important customary amenities and needs thereof.

In *Young* and its progeny, it is noted that concentrations of certain regulated uses, including adult motion picture theatres and bookstores,

"Tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residences and businesses to move elsewhere." *Id.* at 55, 96 Sup. Ct. at 2455.

For a small commercial area, the impact of one theatre of this nature certainly can be deemed to alter the atmo-

sphere of the neighborhood, is likely to affect property values, deter residents from remaining and adversely will impact criminal activity. It will attract some proportion of individuals of behavioral deviance with attendant risks to the citizenry as will be further discussed. The experience of other communities in this regard is pertinent. There need not be an elaborate record made in each and every case as to the impact upon a particular area by virtue of the one theatre involved. Renton is entitled to take defensive note of the common experiences of other communities and need not introduce the testimony of experts on an effect which is very common in experience. *City of Whittier v. Walnut Properties, Inc.*, 139 Cal. App. 3rd, 618 (1983).

Sexually explicit films are stimulative by definition. The Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association, 3rd Edition (1982) itself at section 302.82 states, "watching pornography, filmed or live, causes sexual excitement."

While it may be difficult, of course, to establish that specific untoward predatory sexual overtures are likely to occur as to young children or high school students or others in the vicinity of an adult theatre as a result of over-stimulated patrons of the theatre, there can be some risk of that sufficient to justify dispersal to areas where young people are not likely to be easily accessible.

One of the films stipulated as representative, "*Debbie Does Dallas*," which the advisory jury found obscene, focused upon sex in many forms by older married men with teenage girls. In fact, the high school girls would normally have been of a chronological age under 18. These young adolescent girls are portrayed as highly precocious sexually and engage in various money transactions designed to assist them in accompanying the football team to a game in Dallas. The tone of the film projects a message that these young women are sexually available, knowledgeable, entrepreneurial with respect to sex, and

that sex with young women of this age is not only enjoyable and desirable, but consensual. We also know that it is likely to be statutory rape, a felony, and directly contrary to societal norms evidenced by the most severe standards of the criminal law. One need not be particularly imaginative to see that films of this particular nature are not suitable in the vicinity of a high school or an elementary school. One of the very legitimate interests of Renton is in the security of its citizens, young and old alike.

In the recent case of *New York v. Ferber*, 102 Sup. Ct. 3348 (1982), Justice White in delivering the opinion of the court which approved the constitutionality of a New York statute prohibiting persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicted such a performance stated, at p. 3354,

"First, it is evident beyond the need for elaboration that a state's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' *Globe Newspapers vs. The Superior Court*, — U.S. —, — 102 Sup. Ct. 2613, 2621, 72 L. Ed. 2d — (1982). 'A democratic society rests, for its continuance upon the healthy, well-rounded growth of young people into full maturity as citizens.' *Prince v. Massachusetts*, 321 U.S. 158, 168, 64 Sup. Ct. 438, 443, 88 L. Ed. 645 (1944).

Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth, even when the laws have operated in the sensitive area of constitutionally protected rights . . . In *Ginsberg v. New York*, 390 U.S. 629, 88 Sup. Ct. 1274, 20 L. Ed. 2d 195 (1968), we sustained a New York law protecting children from exposure to non-obscene literature. Most recently, we held that the government's interest in the 'well being of its youth' justified special treatment of indecent broadcasting

received by adults as well as children. *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 Sup. Ct. 3026, 57 L. Ed. 2d, 1073 (1978).

"The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying passage of the New York laws reflect this concern: 'There has been a proliferation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based on the exploitation of children. The public policy of the State demands the protection of children from exploitation through sexual performances.' Laws of New York 1977, Chapter 910, Section I."

Justice White recognized and classified child pornography as a category of material outside the protection of the First Amendment. He further observed at p. 3357,

"The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work."

Although distinguishable as a school library case, the Supreme Court recently deferred to the discretion of school boards in the daily operation of conduct in the schools as it related to books available in the school library. *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 73 L. Ed. 2d 435; 102 S.Ct. 2799 (1982). With respect to a challenge based upon a First Amendment claim, the court pointed out that if the purpose of the school board were the official

suppression of ideas, then First Amendment rights would be violated. However, other purposes such as "educational suitability" in the view of the school board, including removal because of pervasive vulgarity would not (p. 450).

The protection of children from the negative effects of pornography, both as a developmental and safety concern is surely an important state interest, and in fact of compelling and surpassing special interest as these related cases illustrate.

To what extent, it needs to be specifically shown that deviant patrons, of whom there are bound to be some, present a danger to children and others should be determined with the benefit of the doubt to the potential victims. Sexual abuse of children and adults is an extraordinary current societal problem. Protection by the city of this segment of its public and the anticipation of a risk within the vicinity of schools, churches and residential areas is to this court reasonable and the nexus between crime and the presence of such theatres is sufficiently shown by the experience of other communities which Renton should not have to wait to duplicate before being able to enact a protective ordinance.

The very nature of these films encourages imitative conduct. The repetitive style is in the nature of preoccupation and compulsivity. Renton's determination that such a theatre and the exhibition of the films it has described and the legislative purpose findings contained in its ordinances support a substantial governmental interest which this court finds is not feasible to guard against in any less restrictive manner.

Likewise, the preservation of its environment through the use of zoning is a legitimate goal for a city.

"An adult theatre ordinance that furthers such goal satisfies the initial requirement that a city have a substantial state interest to support a law restrict-

ing free speech." *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir.) (1982).

Again, a city need not establish repeatedly the factual basis being considered in passing upon such an ordinance.

"Identical ordinances need not be tested anew each time they are enacted by a different governmental entity by establishing the actual existence of local conditions which would justify it. 'Lawmakers in one locale (should not be denied) the benefit of the wisdom and experience of lawmakers in another community, no matter how similar the circumstances . . .'" See *County of Sacramento v. Superior Court* (Goldie's Bookstores, Inc.) (1982), 137 Cal. App. 3rd 448, 454, 455, 187 Cal. Rpt. 154. "The 'factual basis' behind certain types of zoning laws insofar as those zoning laws require dispersal or deconcentration, has been developed by testimony in other cases. Sociologists and urban planners have testified that a concentration of adult movie theatres in limited areas leads to the deterioration of surrounding neighborhoods. (See *Young v. American Mini Theatres*, *supra*.) This testimony is sufficient and the City need not bring their own sociologist to apply these observations to the City of Whittier." *City of Whittier v. Walnut Properties, Inc.*, 139 Cal. App. 3rd 618 (1983).

The dispersal of the use covered by this ordinance to a location which will not conflict with family, church and school uses is permissible so long as it does not amount to a total ban and it does not.

Of course, the presence of but one adult theatre exhibiting sexually explicit films may be less easy to demonstrate to be a magnet for the perverse or criminally oriented. Nevertheless, on the basis of the experience of other communities, there is to some degree an offensive presence produced with deleterious environmental and

social impacts. The nexus between pornography and crime is recognized though quantification may admittedly be difficult. Suffice it to say that this court concludes that the potential impact of this use upon a small, cohesive area such as the Renton core neighborhood we are dealing with is intensified because of the small geographical area involved. The court finds the City has managed to retain continuity over a considerable period of time (since 1901), although it is admittedly presently surrounded by suburban growth pressure. This use is clearly out of place in a family-use area and the legislative purpose outlined in the City's ordinances, as amended, are supported. This use is assaultive to the sensibilities of basic community interest in maintaining the wholesomeness of family life and family enjoyment in the vicinity involved. The presence of such a use in itself conveys a message of tolerance, approval and encouragement. No matter what restraint has been exercised with respect to advertising, the titles of the films on the marquee proclaim a glaringly outrageous presence virtually around the corner from St. Anthony's Church and Parochial School, the Renton Latter Day Saint's Church, the King Baptist Church, the Christian Science Church, the Renton Lutheran Church, Awareness of Life Church, the Renton High School and single family and multiple family housing.

In an era in which the community has increasingly demanded higher standards of environmental quality as to visual, olfactory and other physical attributes, i.e., signing, architecture, limitations upon manufacturing and production and controls upon aesthetic pollution, as well as substance pollution, the presence of an adult motion picture theatre which exhibits sexually explicit films of this nature can likewise be considered to violate not only a moral, but aesthetic standard, construed in the broadest sense (See *Discussion*, 90 Harvard Law Review, 196

(1975); *Zoning, Aesthetics and the First Amendment*, 64 Columbia Law Review, 81 (1964)). Communities need not provide the laissez faire cacaphony of business uses typically evident in areas where basically anything goes—head shops, pornographic shops alongside any and all other uses, including family residences. The residents of a particular community have a right to protect the community from danger, degradation of its environment and a dilution of its overall moral standards. This is not simply a matter of appearance, but a significant value. Nothing could be more fundamental to family standards than the basic respect of individuals within a marital relationship in family context which each of these films denigrates. A balancing of interests clearly disfavors forcing the presence of such a use in this location on First Amendment grounds when there is no total or effective ban.

The presence of this type of use to the public also conveys endorsement which the Renton legislative body deems incompatible with reasonable promotion of other valid and superior interests. The behaviors represented in most of these films is deviant and some of it represents behavior which is classified as criminal. The tone of the films is, however, that of an amoral outlook with the behaviors represented as being appealing and not inoffensive pasttimes. Many would argue that our homes are intruded upon routinely by murder, rape, violence and all manner of socially undesirable conduct display and that unlike the intrusiveness of television, adults only are admitted to these theaters and those who disfavor them, need not enter. The problem is of the very presence of such a theatre in itself and where it seeks to operate. Renton has, in a reasonable time, manner and place restriction required the presence elsewhere, and this court concludes that it has done so in a constitutionally permissible fashion, does not trammel the rights of a minor-

ity to materials which however unpopular or irritating may risk oppression and censorship which is admittedly abhorrent to a free society, and are readily available elsewhere in the community.

This court joins the conclusion of the Federal court that this ordinance is constitutional on its face and as applied and that the mechanism for abatement and standards employed are entitled to enforcement.

IV. TEST OF THE MATERIALS

The approach of this Court to this problem has been to assure several important procedural safeguards:

1. An advisory jury representing a cross section of our community was utilized to view and consider application of the standards enunciated by the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 37 L. Ed. 419, 93 S. Ct. 2607, reh. den. 414 U.S. 881, 38 L. Ed. 2d 128, 94 S. Ct. 26 (1972) to establish the degree of protection which may be required as to certain enumerated films.

This jury was drawn from the jury pool in the King County Superior Court and represented a cross-section of individuals and background and resulted in a unanimous collective determination as to the ten films in its verdict and special interrogatories (Appendix 1).

There were six men and six women ranging in ages from 31 to 68, three men were single without children, as was one woman, and the rest were married, one divorced with children. The combined number of years in the State of Washington was 310; the combined number of years in King County was 270. (See Table below. Information submitted by jurors to King County Superior Court utilized by counsel in voir dire. Ct. Exh. #107.)

Demographics of the Advisory Jury

| Sex | Age | Marital Status | Family | Birthplace | Yrs. in State | Yrs. in City | Current Residence | Yrs. of Education | Occupation |
|-----|-----|----------------|---------------------|-------------------------|---------------|--------------|----------------------|-------------------|---------------------|
| M | 37 | S | — | No. Carolina | 9 | 9 | Seattle 98122 | 14 | Utilities |
| M | 31 | S | — | Okinawa | 8 | 4 | Seattle 98144 | 16 | Postal |
| M | 38 | S | — | San Diego, California | 35 | 35 | Seattle 98102 | 16 | Sales |
| M | 59 | Div | 30, 37 33, 25 | Wisconsin | 35 | 14 | Auburn 58002 | 10 | Shipping Clerk |
| M | 39 | M | 18 9 20 14 | Seattle | 39 | 39 | Federal Way 98003 | 14 | Lineman |
| M | 34 | M | 28 3 3 mo. | Los Angeles, California | 34 | 13 | Seattle (S.W.) 98146 | 18 | Teacher |
| F | 68 | M | 18 38 10 36 | No. Dakota | 4 | 4 | Seattle (S.) 98178 | 8 | Aviation Production |
| F | 32 | M | 18 3 | Victoria | 14 | 14 | Seattle (N.W.) 98107 | 16 | Homemaker |
| F | 54 | M | 28 30 10 22 | Seattle | 50 | 50 | Bellevue 98006 | 14 | Homemaker |
| F | 35 | M | 18 10½ 20 16, 13 | So. Dakota | 22 | 22 | Seattle (N.W.) 98117 | 12 | Homemaker |
| F | 38 | S | — | Seattle | 38 | 33 | Seattle (W.) 98199 | 16 | Postal |
| F | 63 | M | 20 40 41 | Missoula, Montana | 33 | 33 | Kent 98042 | 12 | Aviation Production |

The court utilized this process to establish a community standard which would be based on the collective contemporaneous judgment of representative members of the community, hopefully to avoid some of the uncertainty and difficulty of utilizing only subjective judicial opinion. This problem is well illustrated in *Penthouse International v. McAuliffe, et al.*, 610 F.2d 1353 (1980). If every community must wait for the subjective opinion of the last five United States Supreme Court Justices, it would seem to this court that there is no effective remedy for a normal community with the usual public resources. No issue, it would seem to this court, should be without some more reasonable finality. Therefore, the court utilized a procedure similar to that of *State ex rel. Cahalan v. Diversified Theatre Corporation*, 229 N.W. 2d, 389 (1975), a Michigan case in which the court impan-

eled an advisory jury to determine whether the films in question were obscene and could be abated under the Michigan nuisance statute. The court in that case utilized the three prong test of *Miller v. California* and the jury returned a verdict finding *The Devil In Miss Jones*, *Deep Throat*, *It Happened In Hollywood* and *Little Sisters* obscene.

Because of the equitable nature of the relief sought, some question exists as a matter of right to trial by jury. However, this court believed that this was a sensible procedure to follow, if not necessary to secure an expression of a community standard through the community itself.

- Secondly, as stated in the foregoing, the *Miller* test was utilized to assist in establishing the extent to which the materials were entitled to constitutional protection. It is conceded that no protection is necessary for materials which are obscene.

The ordinance definition of "used" in definition of "adult motion picture" describes a continuing course of conduct of exhibiting "specific sexual activities" and "specified anatomical areas" in a manner which appeals to a prurient interest (Ordinances 3629, Section I, 3637, Section I, emphasis supplied). The utilization of the single test would ignore the now well accepted three prong constitutional test of delineation of obscene materials required by *Miller v. California, supra*, and any lesser test would seem to be constitutionally inadequate unless the Supreme Court of this state determines in an authoritative construction of state constitutional standard that a lesser standard is adequate.

- In recognition of the key societal principles involved, this court further applied a high standard of proof, i.e., clear, cogent and convincing, rather than that of a simple preponderance of the evidence.

The burden of proof was placed upon the government and the standard employed is that utilized in *Cooper v. Mitchell Brothers Santa Ana Theatre, et al.*, 102 Sup. Ct. Rptr. 172 (1981). This was a public nuisance abatement action and the United States Supreme Court determined that proof beyond a reasonable doubt would not be constitutionally required.

In *Cooper*, the court also utilized a jury on the issues of obscenity, public nuisance and damages prior to the resolution of the equitable issues by the court. The jury found 11 films obscene, 4 not obscene and was not able to reach a verdict on two others. *Cooper* had a complex litigation history as well. See 101 Cal. App. 3d 296, 161 Cal. Rptr. 562 (1980); 114 Cal. App. 3d 923, 171 Cal. Rptr. 85 (1981); 118 Cal. App. 3d 863, 173 Cal. Rptr. 476 (1981) and 128 Cal. App. 3d 937, 180 Cal. Rptr. 728 (1982). (*Deep Throat* and *The Devil In Miss Jones* were determined obscene among others, but the litigation amply demonstrates the difficulties of taking action in any efficacious manner.)

It is essential, of course, in issues involving prior restraint that the mechanism for a determination be consistent with standards which preclude arbitrary or all encompassing discretion reposed in a governmental official under vague or problematical speculative standards. An action to abate places the tender before the court and the process utilized employs a recognizable application of law by a jury which will apply a community standard best known to those who comprise it. If one is to conclude that the shifting sands of public opinion as to these matters renders this an impossible task, then no regulation would be possible at all.

The City of Renton, in its ordinance, in providing for an action to abate a nuisance contemplates a civil rather

than a criminal proceeding. Normally, this would entail a more relaxed standard of proof; however, as stated, in response to the vital issues raised with respect to protected speech, this court has utilized the *Müller* test and a higher standard of proof commensurate with constitutional requirements.

V. THE FILMS

The full record of films exhibited at the Renton Theatre commencing in January 20, 1983 consists of 64 films (Exhibits 1A-64A represented by video cassettes entered into evidence and stipulated to be identical to films shown at the theatre and times in question). The ordinances in question were enacted, amended and predate the challenged exhibition. There is no suggestion in this case that the ordinance was designed to put the Renton Theatre out of operation after the fact.

The parties also stipulated that ten representative films would be viewed by the court and the jury in a specific order and that these films were representative of the film fare exhibited at the Renton Theatre. The court determined that the films would be shown in the theatre, rather than in the courtroom to provide as normal as possible the context in which the films would be normally exhibited.

The films were seen on three successive days. Recesses were taken in the morning, afternoon and at noon.

As an overall finding, this court finds that each of the films selected is characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas as defined in the Renton ordinance. Although the films vary as to emphasis, the court finds such emphasis to overwhelmingly predominate in each and every film and to be the central focus of each of the films taken and considered as a whole.

The exhibition of the ten films occurred in the following order:

1. Little French Maid
2. Devil In Miss Jones
3. Up and Coming
4. Society Affairs
5. San Fernando Valley Girls
6. Deep Throat
7. Body Talk
8. Pandora's Mirror
9. Debbie Does Dallas
10. Taboo II

Instruction 14 directed the jury under the *Miller* test:

"In order to find a motion picture film obscene, as that term is used in these instructions, the plaintiff must prove each and every one of the following elements by clear, cogent and convincing evidence.

1. That the average adult person, applying contemporary community standards, would find that the motion picture film, taken as a whole, appeals to the prurient interest in sex; and

2. That applying contemporary community standards, the motion picture film depicts or describes sexual conduct in a patently offensive way; and

3. That the motion picture film, taken as a whole, lacks serious literary, artistic, political or scientific value."

Instruction 8 defined "prurient" as follows:

"'Prurient' as that term is used, means a shameful or morbid, meaning unhealthy or unwholesome interest in sex or nudity."

In addition to the video cassettes, the City of Renton offered certain time and motion studies which were refused by the court (Exhibits 1B-64B).

Certain exhibits were admitted pertaining to the City's statistical analysis and printout in support of its chart illustrating the percentage duration of each film illustrating specified anatomical areas or specified sexual activities exhibited at the Renton Theatre (Exhibit 73, 73A, B, C, D).

The quantitative analysis by the City as to the stipulated films was generally:

| | |
|------------------------------|-----|
| 1. Little French Maid | 68% |
| 2. Devil In Miss Jones | 70% |
| 3. Up and Coming | 37% |
| 4. Society Affairs | 45% |
| 5. San Fernando Valley Girls | 70% |
| 6. Deep Throat | 64% |
| 7. Body Talk | 38% |
| 8. Pandora's Mirror | 52% |
| 9. Debbie Does Dallas | 74% |
| 10. Taboo II | 65% |

The court also generally correlated sequence duration and finds that the time and percentages estimated by the City are sufficiently accurate. The court also finds as an overall finding, that all of the films include a substantial content of highly repetitive, sexually explicit conduct, which includes masturbation, fellatio, cunnilingus, oral, anal and vaginal sexual intercourse, often occurring simultaneously and involving several people, repetitive ejaculation visibly displayed, to the body and usually to the face of female participants. Same sex activity was limited generally to women, although mixed groups of men and women such as two men and one woman or two women and one man or numerous people engaged in vari-

ous activities simultaneously was common. No film contained any extreme sado-masochism behavior, forcible rape or violence, assaultive or mutilative behavior. The films contain various types of male dominance and female submission. Human genitals were overwhelmingly portrayed in a state of sexual stimulation or arousal. There was continuous erotic touching of human genitals and private areas, pubic regions, buttocks and female breasts. Specified anatomical areas were continuously displayed in many instances for long periods of time over nearly the entire area of the motion picture screen and sequences were repetitive and continuous.

Except for one film, *Body Talk*, sex was not treated in any manner as part of a meaningful or serious relationship, but as a mechanical function with an emphasis on endurance, athleticism and release. The women are dehumanized and reduced to objects of sexual access. Women are projected generally as nymphomaniacs.

Some of the films include scenery, classical music, expensive cars, houses and settings and some backgrounds for interest. Despite this flimsy attempt, and some of the more recent films do reflect greater production budgets, the primary and overwhelming purpose of these films is to focus upon erotic sexual activity.

This court agrees with a film commentator, David Chute when he says,

"Most hard core films are still produced by and for men and female viewers quickly realize that the show is not intended for them . . . The emblematic figure here, I think, is not the female lust object in a pornographic film, but the male star with whom the male viewer is invited to identify. He is our standard bearer." 17 Film Comment 66 (S/O 1981) P. 68.

Chute describes the two typical male leads as one who has built a career shoving women around and the other

more recent being a person out for kicks and not power. (p. 68) The films challenged by Renton are typical of the foregoing. (For additional writing in this field, see *Pornography and Silence*, Susan Griffin, Harper and Row, 1981; see also *The Report of the Commission of Obscenity and Pornography* (1970).

While there has been some effort to sanitize the more extreme abusive and sexist aspects of this type of film in the more recent film productions, there is little question that the basic appeal is of an erotic sexual nature for men. When Mr. Forbes testified with respect to the advertising available for the films, it is clear that the basic appeal of the films as projected by himself in making the advertising selection on several occasions reflects this basic acknowledgement of the nature of the film as a basically erotic type of presentation. (P. Exh. 72, including dates of exhibition.) To claim that they appeal to interest other than prurience is not arguable; as to what degree of prurience may be arguable only.

VI. THE TEN FILMS

1. *The Little French Maid*. In spite of a background of classical music, residential backgrounds and colorful garden and outdoor photography, this is basically a string of sexually erotic and explicit scenes in which the heroine goes from vaginal, anal and oral sex repeatedly, and talks and muses about it when she is not actually doing it. There is no story line with the possible exception of the last liaison being one she sees as being more promising in a love sense. However, the film is monotonously repetitive in its complete emphasis on sex acts between the heroine, a man, two men, or two women, with the locations of the events changing from residential locations. Approximately 68% of the film is devoted to such erotic scenes.

The emphasis of the film is on the observation of the various sexual depictions and is devoid of any other con-

tent. It is a film which centers completely upon the use of the maid by the men which she does not find particularly satisfying but continues to participate on a presumably voluntary basis. There is no force. It is voyeuristic, patently offensive in its banality and reduction of the sexual experience to a fairly mechanical interface of varicous sexual organs and has no discernible scientific value or any other value whatsoever.

The jury found this film obscene within the meaning of the instructions and the Court concurs in that finding.

2. *The Devil in Miss Jones*. The film starts with a graphic depiction of a young woman slitting her wrists in a drawn bath and committing suicide with the blood merging with the bath water. The film is in dark tones, which intends to accentuate the imagery. (This could be due to the age of the print.) Having committed suicide, Miss Jones is advised that she is condemned to eternal damnation, which the devil manages to provide for her in the form of sexual tutelage to which she becomes very enamoured only to be relegated in the end to an eternity of sexual frustration.

This film has an eeriness and creepy quality to it as it is not only offensive to the notion of sex, but to religion as well, and the ultimate sense of self loss and cosmic powerlessness. It courses through the usual variety of sexually explicit and erotic scenes, including graphic and complete illustrations of anal and oral sex, a pair of women making love, use of a snake, all occurring with complete and total depictions and occupying significant episodic time sequences. 70% of the film footage is utilized for sexually explicit erotic scenes.

It is not difficult to see how the jury found this particular film patently offensive and without any serious scientific value or unacceptable to contemporary community standards. The Court would concur in the jury finding.

3. *Up and Coming*. This is a newer film with a higher production budget than earlier films. It is in color and actually has interesting country music in it. It also is the story of a young woman who is attempting to become a country music star and goes from one sexual adventure to the next in her quest in graphic detail and with the usual oral, anal, vaginal, group, single and combination sexual activity to realize her ambitions. However, the film does use approximately 40% of total time in the sex related depictions and the balance for the story. The jury did not find this film obscene, probably determining that it was not offensive enough; there was a story line, some humor and a plot that was less of a transparent vehicle than in some of the other films. The Court defers to the judgment of the jury.

4. *Society Affairs*. This is one of the more recent, higher production budget films which has a story line, good photography, interesting music, good settings as well as the usual smorgasbord of sexually explicit activity as between women, a woman and one or two men, singly or simultaneously, a variety of relationships and it all centers around the wedding of an heir. The heir's father is attempting to set him up in marriage with a woman who will divorce him and secure a large property settlement for the benefit of the father, with whom she is sexually involved.

The hero is a look-a-like for the heir and goes from one sexual dysfunction rescue to the next in graphic detail and with the usual oral, vaginal and anal sexual exercises and Herculean phallic displays. He ultimately uncovers the nefarious plot of the father and saves Howard his fortune, though his original intent was simply to steal all of the wedding gifts which he now secures in gratitude from Howard. Approximately 40% of the film time is devoted to sex, the rest to the story, and the jury did not find the film obscene.

The Court defers to the finding of the jury.

5. *San Fernando Valley Girls*. This is a silly movie about a style of individual whose language is peculiar to the area youth culture. Adjectives such as "tubular" repeat through the film and the emphasis is upon sexually erotic encounters between the girls, the girls and a man or more than one man, or a mix. Except for the thread of a Valley Girl Contest in a club, there is nothing else in this film other than the views of the usual oral, anal, and vaginal sexual activity, long depictions of sustained erection and ejaculation onto the mouths or onto the bodies of the young women in presumed enjoyment.

Approximately 70% of the entire film was devoted to erotic imagery, and only 30% to other scenes. The jury did not find this film obscene, and the court defers in their finding, though it is in a closer category in the Court's view to *Little French Maid*.

6. *Deep Throat*. This is a story of a sexually unfulfilled young woman who is guided to the discovery of sexual fulfillment when her therapist locates her clitoris in her throat. After that, it is largely repetitive and compulsive enjoyment of oral sex with some variations with the scenes of sexual activity occupying approximately 60% of all film footage. She is utilized as a kind of assistant to the therapist and her various sexual encounters then involve various individuals and their respective therapeutic need circumstances. One such individual, for example, has to utilize a burglary/rape scenario and she is supposed to pretend that she is frightened. The therapist is also repeatedly engaged in sex. The emphasis of the film is clearly upon erotic sexual material. There is some element of farce. The jury did not find this film obscene and the court defers to their finding, although this film has been repeatedly found obscene elsewhere relatively recently.

7. *Body Talk*. This is a more recent higher production cost film in color and with an emphasis upon inter-

esting locations. An older woman who is financially maintained by a voyeur falls in love with a young sculptor whose parents disapprove of the relationship. The woman magnanimously arranges for them to separate and he to go to study art abroad as a gesture when she discovers she is terminally ill and eventually the young sculptor learns the true situation and they are reunited briefly before her death.

The story does occupy a substantial portion of the film and approximately 40% is devoted to the usual scenes of oral, anal, vaginal and group sex. There are sex scenes involving women together, a woman and one or two men, with the voyeur watching at some scenes. This is a pornographic soap opera.

The jury did not find this film obscene under the *Miller* test and the court will defer to that finding.

8. *Pandora's Mirror*. A young woman becomes entranced by a mirror which transports her through several historical vignettes in which erotic sex occurs in various contexts. She becomes compulsively attracted to the mirror and what it provides. About 52% of the film is devoted to sexually erotic scenes of intercourse of an oral or vaginal nature, sustained erections, ejaculations and the usual similar material to the other films. The photography, settings and staging is more subtle and reflects a more interesting production style, but is voyeuristic in a compulsive sense.

The jury did not find this film obscene under the *Miller* test criteria and the court defers to their finding although it is indistinguishable from those found to be obscene.

9. *Debbie Does Dallas*. This is a film in which a group of high school cheerleaders attempt to raise money to accompany the football team to a game in Dallas through babysitting, car washing, etc., and are soon able to im-

prove upon the financial yield by exchanging a variety of sexual favors to various men, usually married men who are ostensibly either an employer or school superior. There is also sexual activity graphically filmed as between the girls and their football player boyfriends.

This film emphasizes the same type of sexual material that the other films contain by way of sustained erections, oral, anal, vaginal sex, ejaculations and promiscuous behaviors with the additional element of an emphasis upon very young women and men. Though the film carries a written legend of the girls being over age 18, the obvious content of the film infers a younger chronological age, age 16 if not younger, and is very offensive in that regard, not only because of the nature of the activities which are in the film, but because of the emphasis on the desirability and availability of very young women to older men in this fashion.

The film is apparently a species of film where the pre-occupation with the young is primary. The message of the film is clearly that the young are experienced, knowledgeable and available. The distance between a film depiction and re-enactment in real life is too close for comfort. This film is beyond the usual voyeurism inherent in pornographic viewing, but can easily lead from myth to real life in a highly sensitive area, i.e., sexual abuse of the young which is clearly a violation of criminal law as well as an extreme breach otherwise.

Nearly 70% of the film was devoted to sexually explicit erotic scenes. The jury found this film obscene and the court concurs in that finding.

10. *Taboo II*. This is a film in which a family wallows in incest. The brother is able to achieve a sexual relationship with his girlfriend, his sister, a friend's mother and his own mother. The sister is able to entice her father into a sexual relationship with her mother sleeping in the same bed, the entire culmination of which is then

satisfying sex for the parents whose marriage has deadened and the father attracted to a sexual relationship with his secretary. 65% of the time of the film is involved in erotic depictions of the various individuals or friends engaged in group or sexual activity with one another or in groups and the activity is generally similar to that portrayed in all of the other films. It is the context of blood family members which makes this film very different and highly offensive and perverted, and without any value, let alone serious scientific value.

The jury found this film obscene under the *Miller* test and the court concurs in that finding.

VII. THE EXPERTS

Richard Green, M.D., is a research oriented psychiatrist from the Department of Psychiatry, State University of New York, Stonybrook. He took an undergraduate degree in Psychology from Syracuse University, his medical degree from Johns Hopkins University, Baltimore, continued his studies at the University of London, was a faculty member at the Human Sexuality Program, University of California between 1968 and 1974 and thereafter established the Human Sexuality Program at (SUNY), Stonybrook where he is engaged in research as contrasted to treatment. He has 100 professional publication credits and is a contributor to six medical volumes.

At the request of the defense, he reviewed 8 or 9 video cassettes of the films (excluding *Taboo II*). He basically testified that all of them have serious scientific value when considered as a whole.

Dr. Green participated as a committee member in the development of the American Psychiatric Association's DSM III criteria and would utilize that definition in identifying those sexual behaviors which would appeal to prurient interests. He would include bestiality, transvestism, exhibitionism, voyeurism and sado-masochism.

He would also include compulsive rapism, lust murder and necrophilia, which is not specifically listed in the diagnostic criteria.

Dr. Green testified that the films had serious scientific value basically because they were capable of promoting better communication around sex and better understanding. Where he found a story line or entertainment factor, he would focus upon that circumstance as being the primary interest of the film. He did state that he would not wish to testify concerning a variety of films which included bestiality, kiddie porn, rape and torture episodes. He did not see these films as transmitting a particular value system, i.e., prostitution, and did not see them as producing imitative behavior, although he did say that couples might be willing to expand their repertoire with the assistance of the variety of sexual behaviors illustrated in the films. When asked if many of the films reflected that one partner was using another, he did not find this disconcerting in that, as he said, there appeared to be an equal amount of using of one by the other of the various individuals.

The films themselves are, of course, the best evidence of what they depict. Expert testimony, though affording the benefit of opinion as to them, is not binding on the triers of fact.

While this court does respect the training, education and research efforts of this witness, it finds that the conclusion advanced are unsupported by the films themselves.

It also should be noted that this witness has testified approximately 28 times, always for the defense and on about one-half of those occasions, retained by defense counsel in this case. Very significantly, this witness has never found any material without some serious scientific value. So long as some information is contained, Dr. Green would be satisfied of its serious scientific value. If that standard were to be employed by this Court, that

would amount to no standard at all, and it is the view of this Court, that the term "serious scientific value" must be interpreted in a stricter, scholastic sense of valid, academic research process and product.

The witnesses for the defense appear to have had some strong connection and acquaintance, if not an on-going collaboration in advancing sexology as a separate academic speciality then in some more informal manner. These witnesses are not typical of the usual independently retained expert. While this is not as true of Dr. Satterfield of Minneapolis, the others appear to be associated in various ways and cannot be seen as independent from one another nor very objective, since their commitment to their views is quite clear and apparent.

Ms. Carolyn A. Livingston was called by the defense. She is a sex therapist who has been trained at the Institute for the Advanced Study of Human Sexuality established by another witness called by the defense in this case, Robert Theodore McIlvenna.

This Institute was incorporated in 1976. The State of California permits the Institute as of June 1981, to confer a Doctor of Education in Human Sexuality Degree (Ed. D.) as contrasted to a Ph.D. The catalog (plaintiff's Exhibit #3) also indicates that a Ph.D. candidate prepares a traditional dissertation, and also indicates additional degrees, Master of Human Sexuality (M.H.S.) and a Doctor of Human Sexuality (D.H.S.). There are also professional programs which award certificates, including Forensic Sexologist certificates and a summer certificate program. Ms. Livingston secured a Doctorate from the Institute and her research work involved studies of Venusian Church members in the Seattle area.

Ms. Livingston is also a trained registered nurse. She speaks to many groups throughout the state, mainly in medical contexts such as the Providence Hospital Cardiac Unit, Post-Surgery, Ileostomy, Alcoholism Recovery, Sex-

ual Adjustment and estimates that she has spoken to approximately 7,000 people. She speaks mainly to physicians, nurses, social workers, students at various colleges and various community groups.

She does not use the films involved in this litigation in her presentations, although she does use other film materials.

She testified as to the films that their fantasy and educational, therapeutic and communication content supported in her opinion a serious scientific value criteria of the *Miller* test. She testified that none of the films, in her opinion, appealed to a prurient interest in sex.

She surprisingly testified that she felt *Deep Throat* was capable of being shown on prime time television, suitable for viewers 16 years of age and over. She would define morbid to the point of being nearly pathological or making one sick and would include in that, sex with animals, voyeurism, exhibitionism, and the use of children.

The defense witnesses shared the view that the reason for attendance at such films was a healthy curiosity about sex.

This witness appears to the court to be sincerely motivated in assisting individuals in overcoming medically related sexual dysfunctions or disabilities. Her views, however, with respect to the relative mildness of the films in issue as compared with an available range she may be familiar with, does not necessarily reflect the Washington overall community standard which this court finds to be more restrictive than the standard advanced by this witness. The court finds that her audiences are not as cross sectional as our randomly selected jury.

On cross examination, Ms. Livingston did acknowledge her concerns that certain of the films were therapeutically defective. For example, she did acknowledge the risk of

transfer of bacteria from one bodily cavity to another with uninterrupted progression from oral/vaginal/anal/oral/vaginal sex without hygienic cleansing. She also questioned the concept of a therapist and patient engaging in sex such as was portrayed in *Deep Throat*; testified that she was opposed to public sex, although she did not equate the film scenes depicting group activity as such. She also testified that she was not comfortable with *Taboo II*.

Again, the very general use of "science" as potential self-help is not viewed by this court as comporting with the formal systematic, empirical study and examination normally associated with that term and the intent of the United States Supreme Court in that connection.

Dr. Sharon Satterfield is the Director of the University of Minnesota Medical School Sexuality Program, which she stated to be the largest medical school clinic of its kind in the United States, both as a treating and research facility. Dr. Satterfield specializes in Child Abuse (sexual) and conducts a treatment program for perpetrators, mainly middle class patients (currently 70 offenders). This witness has extremely high professional credentials. She has testified previously in favor of a proposed Minneapolis ordinance to the consternation of Mr. McIlvenna and she has participated in governmental regulation.

She is well acquainted with the professional literature and acknowledges that she has seen some cases of habitual use of pornography, one or two compulsive users.

In treatment, fantasy provides for a broader communication and she testified that the underlying fantasy of offenders must be surfaced in the treatment process. She would see the fantasy stimulation content of *Devil In Miss Jones*, *Pandora's Mirror* and all of the films as containing serious scientific value and testified that such films have been used with positive results in treatment.

Her definition of science is a broad definition of a systematic acquisition of knowledge.

The court is at a loss with the testimony of this highly qualified physician and concludes that she simply has been persuaded and holds the views held by Mr. McIlvenna and Dr. Green which this court has not accepted as controlling in this case.

Robert Theodore McIlvenna is the Director of the Institute for Advanced Study of Human Sexuality. He also is an ordained United Methodist Minister. He is a leader in the effort to establish sexology as a separate discipline and is the leadership force in an international, as well as national effort in that regard. He has testified in many courts. He has accumulated considerable data drawn from Sex Attitude Profiles from all persons engaging in programs with his institution and has undertaken field research and has had on-going professional contact with many institutions in the Northwest and various professionals.

The Sex Attitude Profiles are updated every six months, one, two and five years, with some attrition factor. The court observes that those who submit these profiles are, of course, individuals who are willing and interested in revealing such information about themselves which indicates a certain self-selection in the group sample represented.

In testifying as to his opinion that none of the films appeal to prurient interest, Mr. McIlvenna characterized *Deep Throat* as mythology, *Devil In Miss Jones* as a classic film, *Debbie Does Dallas* as one of the most popular films of all times "which simply shows a lot of sexual activity," *Taboo II* as a "thinly guised incest thing . . . (where) everyone knows what is going on and goes home, *Little French Maid* as a series of sex activities."

This witness testified that he knows Dr. Green, Dr. Satterfield and Ms. Livingston. He acknowledged that he

was shocked and dumb-founded at Dr. Satterfield's pro-regulation testimony in Minnesota. He himself has testified for the defense on all occasions. He discussed that the testimonial fees he receives are used to balance his research funds for institute activity.

While Mr. McIlvenna was permitted to express an expert opinion because of his on-going collection of data and experience in the Washington area, it is the conclusion of this Court that his attitudes are greatly influenced by his commitment to his organization and its purposes and are more reflective of a limited San Francisco environment than that of this state. His data is not reflective of the mainstream of Washington residents and as the jury verdict reflects. Further, certain personal strategies of a therapeutic nature utilized by Mr. McIlvenna are professionally unsupportable and created considerable question in the mind of this trier of fact as to the professional judgment utilized by Mr. McIlvenna in his professional work.

The City of Renton introduced the testimony of *Professor Ernest R. Van Den Haag*, a treating New York psychoanalyst and current Professor of Jurisprudence at Fordham University. Professor Van Den Haag has taught law and has lectured widely at various prestigious academic institutions, including the Harvard Medical School, Yale, Stanford, Berkeley and taught at the New School for Social Research. . . taught at the latter a course in Love and Sex. He has written extensively in the area of pornography which he readily admits he opposes in all forms. His lectures are concerned with the separation of sexual gratification from affection, love as between individuals and forms of love such as between parent and child and between man and woman.

He defines science as an attempt to discover new facts for the purpose of being able to control or predict behavior. He rejects fantasy enrichment as any part of scientific endeavor and sees these films as reducing the

participants to the functioning of their sexual organs. He finds that there are clearly messages in the films of a misleading and harmful nature.

He views *Taboo II* as recommending incest between a father and a daughter as a means to promote a better sexual adjustment between the parents whose marriage is vapid. He sees *Little French Maid* as outright promiscuity which in turn he views as a self-destructive phenomenon leading to personality disintegration of the participant.

He sees none of the films as healthy or wholesome and views the humans as being either mutually exploitive and utilizing the women as sex objects. He testified that in his view, no one in the films has any real interest in another person and only as a means to selfish sexual gratification.

As to the emerging specialty of Sexology, he would find this highly questionable, though he did recognize that there have been past scholars who have attempted to address the subject in more particularity, notably Kraft-Ebbing, Herschfeld, Freud, Black, Mircuse.

He believes that some people who attend these films are curious, others addicted and obsessed with the movie replacing gratification and becoming a masturbatory stimulus and he believes the same to be anti-therapeutic in that some persons can become dependent on such films as a sexual outlet. He testified that he has personally studied the attendance of persons at such films and estimates that approximately 20-25% of the attendees are habituals. He bases this upon his own observations and inquiries regarding practice of attendees and employees personally communicated with by himself at the theatres. He estimated that of 300-500 patients and approximately one third attending movies, he estimates that a half again of those, he would consider addicted or compulsive habituals.

In discussing the pathological aspects of the films, he pointed to the excessive and dangerous sexual attachment to a parent in *Taboo II*, the pleasure of voyeurism in *Pandora's Mirror* and saw the love affair in *Body Talk* between the woman the young sculptor as being merely after-thought.

In his opinion, none of the films had any meritorious value as would be required under the *Miller* test and hence, all would be obscene.

Dr. Jack Raymond Faghin, is a practicing clinical psychiatrist in the Seattle area who has treated patients with sexual problems since 1953. His patients include a broad spectrum of economic, age and cultural groups. He acknowledged that he does not publish because of the demands upon his time by his treating work, attempts to maintain current knowledge of medical and professional materials in the field and is generally familiar with conventional media publications. He is especially interested in sexual abuse issues, particularly as to children.

He testified he is unaware of any scientific article which explores the nature of individuals who attend sexually explicit movies. He did state that he was able to find a three line comment indicating that sexually explicit films could be useful in a treatment modality. He, himself, does not use films and testified that he would not send a patient to such movies, as he believes in guided therapy.

He would not support sexology as a separate discipline because he believes that it is professionally mandatory to consider the interaction of the entire personality and he cites other professionals as being in support of that position, including Dr. Helen Singer-Caplan of Cornell and Dr. Harold Leaf of the University of Pennsylvania.

In considering the ten films, Dr. Faghin expressed his opinion that none of the ten have any serious scientific value. He rejected the proposition that fantasy value was

equivalent to scientific value or that communicative value was of scientific value, although he would acknowledge that it could be useful. Likewise, he found no serious educational or therapeutic value in the films.

As to the latter, he believed that the film messages were in fact harmful. He testified that in *Taboo II*, in his opinion, the impression is given that incest is acceptable, and as a physician, he testified forcefully that in no instance has he ever seen any benefit derived as a result of incest. In fact, it was, in his view, clearly harmful.

He believed that the overriding message of *Debbie Does Dallas*, i.e., the exchange of sexual favors for money, is a similarly negative message and not therapeutically useful, but destructive.

He testified that in his opinion, all of the films appealed to prurient interest, are patently offensive and breach our community standards.

He especially referred to sex with patients as being decried by every reputable professional organization in the country in criticizing *Deep Throat*. He was candid in saying that the public might tolerate movies in an adult theatre, it would not find acceptable on prime time television.

Dr. Faghin, in this court's opinion, was the witness most closely familiar with the state population with which we are concerned in establishing a community standard.

He also has direct clinical experience with this community over many years of a highly qualified nature.

This court has accepted his testimony as being the most professionally acceptable and accurate in reflecting a professional whose approach is to consider the integrated personality, testimony which is more probative by virtue of being locally clinically corroborated and offers an acceptable and reputable medical standard.

His testimony, as it is consistent with that of Professor Van Den Haag is also borne out to a greater degree by our advisory jury who rejected the views being advanced by the defense.

While not obligated to do so, this court has accepted the verdict of the jury as the basic expression of our community with respect to the issues being considered. The jury thoughtfully and deliberately considered each film as the special interrogatories indicate, and returned their verdict.

The jury was able to consider each film independently as their special interrogatories reflect. While this court might in some particulars vary in view as to the individual films and the ultimate conclusion reached, it has determined to accept the collective expression of this jury as being reasonable and will confirm the same, finding also that each of the films is substantially similar in genre as depicting "specified sexual activities" or "specified anatomical areas" in a manner which appeals to a prurient interest in sex as a continuous course of conduct since January 20, 1983.

The Court recognizes the jury verdict as being the primary community expression of the standard applicable. In finding four of ten films obscene, one might view 40% in too literal a mathematical sense. The ten films stipulated to by counsel do not necessarily reflect the most offensive nor the mildest of the total sixty-four films and must be considered as a compromise group. It is the conclusion of this court in view of this circumstance, that there is in fact a heavy weighting in the direction of unprotected materials. The court finds that the jury verdict more than suffices to support the continuous course of conduct requirement of the ordinances, and that inasmuch as all of the films reflect an identical genre and emphasis, that their exhibition should be abated at the Renton Theatre.

VIII. THE REMEDY

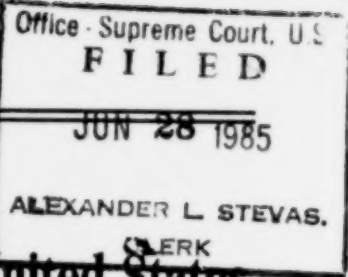
Abatement as to the exhibition of the films determined to be obscene is clearly appropriate and will enter.

The Court is prepared to find that there is no adequate remedy at law available to the plaintiffs short of restraining the defendants from exhibiting at the Renton Theatre, films such as those demonstrated to have been shown continuously since January 20, 1983, and that the four films found by the jury to be obscene are substantially identical in genre to those displayed generally and represented in the six other stipulated films, that the exhibition of these films does constitute a nuisance per se, and an "adult motion picture theatre" as defined in Renton Ordinance No. 3526 as amended, and that the same should be abated by injunctive order. The question of further available equitable remedy is reserved by the Court for additional submission of law under the law of the State of Washington pertaining to injunctions and abatement and other remedies as may be appropriate.

What is less certain is the availability of other sanctions under the general equitable power of this court under state law. Other courts have struggled with this question. *Van deCamp v. American Art*, 188 Cal. Rprt. 740 (1983). There is merit in the argument that the court should be empowered to utilize flexible, equitable remedies if permitted by state law. The question of the full form and detail of injunctive relief will therefore abide additional legal submission and additional presentation.

DATED this 9th day of March, 1984.

/s/ Nancy Ann Holman
NANCY ANN HOLMAN
Judge



9
No. 84-1360

In the Supreme Court of the United States

October Term, 1984

THE CITY OF RENTON, ET AL.,
Appellants,

VS.

**PLAYTIME THEATERS, INC., A WASHINGTON
CORPORATION, ET AL.,**
Appellees.

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF AMICUS CURIAE OF JACKSON COUNTY,
MISSOURI, IN SUPPORT OF
THE PETITIONERS**

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BRIEF AMICUS CURIAE OF JACKSON COUNTY,
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MOTION OF JACKSON COUNTY, MISSOURI, A
POLITICAL SUBDIVISION OF THE STATE OF
MISSOURI, FOR LEAVE TO FILE A BRIEF
AS AMICUS CURIAE

Jackson County, Missouri, a first class county having a constitutional charter form of government in the State of Missouri, comes now by and through its Office of the County Counselor, and respectfully moves for leave to file a brief *amicus curiae* in support of the petitioners in No. 84-1360, *The City of Renton, et al. v. Playtime Theaters, Inc., et al.*, as provided for in Rule 42 of the Rules of the United States Supreme Court, 28 U.S.C. Jackson County is a State political subdivision within the meaning of Rule 36.4.

INTEREST OF JACKSON COUNTY, MISSOURI

Jackson County is a first class charter county and political subdivision of the State of Missouri, operating under the authority of Mo. Const. art. VI § 18. As a home rule county, Jackson County has independent authority to enact a broad range of ordinances covering activities in the unincorporated (and, to a lesser degree, incorporated) areas of the county. Included in that authority is the power to adopt a comprehensive plan for planning and development of the unincorporated area and to enact zoning ordinances for implementation of the comprehensive plan. The unincorporated area of the County fringes on a number of growing municipalities, including Kansas City.

On September 6, 1984, the Jackson County Legislature—a 15 member legislative body elected by popular vote in four year intervals—enacted an ordinance which placed adult bookstores, adult mini motion picture theaters, and adult motion picture theaters in “E” zones (light commercial), with the proviso that such businesses could not be located within 1500 feet of churches or schools. Extensive community concern about the presence of such operations and their impact on community institutions and nearby land values prompted the enactment of the ordinance. Definitions, as well as the concept, were derived in part from the Detroit ordinance upheld in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

Jackson County is now involved in litigation under 42 U.S.C. §1983, in which an adult bookstore operator affected by the ordinance seeks to permanently enjoin the ordinance's enforcement and asks for punitive damages against the County Legislators individually (*People Tags, Inc., et al. v. Waris, et al.*, Case No. 85-0028-CV-W-9, U.S.

District Court for the Western District of Missouri, Western Division). The Plaintiffs base their complaint primarily upon comments made by County Legislators during public hearings held prior to the ordinance's enactment and rely in part upon *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527 (9th Cir. 1984).

SUMMARY OF ARGUMENT

The Court of Appeals' opinion burdens local governments with a new and unreasonable burden of proof in their defense of police power ordinances. Under the Ninth Circuit's approach in this case, a reviewing court may extract from an ordinance's public record the “inference” of legislative intent to suppress free expression. The Ninth Circuit does not suggest how local governments can prove the absence of such intent, especially when the inference is divined from the record by a reviewing court removed in time from the ordinance's enactment. *Amicus* Jackson County contends that this “inference” is in fact a conclusive presumption which adult entertainment businesses can use to frustrate legitimate efforts to regulate the location of commercial enterprises.

This new presumption concerns Jackson County for two reasons. First, it gives unrealistic credence to the colloquies and spontaneous comments that are common to legislative forums. Second, it creates a broad avenue for judicial encroachment upon legislative efforts to exercise police power and ignores the standards established by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968). Under *O'Brien* and other cases, the constitutionality of a given ordinance must be judged on the ordinance's face, not on the various claims of “illicit motivations” attributed to the ordinance by the parties challeng-

ing the ordinance. Where the challenged ordinance is an exercise of police power, an inquiry into legislative motives is an impermissible foray into a legislature's policy-making discretion.

Because the Ninth Circuit Court of Appeals has abrogated the standard of *O'Brien* and other decisions in favor of a new rule requiring local governments to rebut "inferences" culled from legislative debate by aggrieved adult entertainment vendors or by other commercial enterprises, *amicus* Jackson County urges reversal.

ARGUMENT

Separation of Powers Mandates That the Judiciary Not Use the First Amendment to Overturn Local Zoning Ordinances on Grounds of Illicit Motivations of Individual Legislators.

Amicus Jackson County is prompted to write this brief because the Ninth Circuit Court of Appeals' decision in *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527 (1984), would—if followed—place an intolerable burden on local governments seeking to exercise zoning control over commercial enterprises. In *Playtime Theaters*, the Ninth Circuit held that where the record gives rise to an inference that "a motivating factor behind the [adult entertainment zoning] ordinance was suppression of the content of speech," 748 F.2d at 537, the ordinance will be invalidated unless the inference is rebutted. This extraordinary evidentiary burden represents a serious departure from this Court's pronouncement on judicial review of legislative acts. At stake is the degree of freedom accorded to entities such as Jackson County in developing basic police power ordinances.

A. A judicial search for "suppressive intent" is acceptable only for a very narrowly defined class of cases.

In *United States v. O'Brien*, 391 U.S. 367 (1968), this Court considered the extent to which legislative motives may be examined where a statute incidentally restricts the exercise of First Amendment rights. The Court observed that inquiries into congressional motives are a "hazardous matter" and declined to void even unwise legislation "which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." 391 U.S. at 383-384. See *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 469-470 (1981) (California statute's criminalization of intercourse with minor females was—speculation on legislative motives notwithstanding—a per se indication of statute's intent to discourage such conduct).

Thus, due to the inherent dangers in judging the enactment's compliance with the First Amendment on the weight of individual legislators' statements, such statements may be considered by Courts only for purposes of statutory interpretation or "in a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purposes." 391 U.S. at 383, n. 30. This "very limited and well-defined class of cases" is restricted to bills of attainder and other *ex post facto* forms of punishment. *Id.*

Therefore, before delving into the diverse individual motives underlying legislative police power enactments, a court must first determine that the enactment under review has the *prima facie* indicia of a punitive or penal statute. The cases cited in *O'Brien* provide very clear

guidance on making that determination. The plurality opinion in *Trop v. Dulles*, 356 U.S. 86 (1958), set forth the basic test:

If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.

356 U.S. at 96 (Warren, C.J.).

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), expanded upon *Trop* by establishing a multi-factor test for distinguishing regulatory and penal statutes. Under *Kennedy*, a reviewing court must consider whether the sanction imposed by statute

- (a) involves an affirmative disability or restraint,
- (b) has historically been regarded as punishment,
- (c) comes into play only on a finding of scienter,
- (d) operates to promote retribution or deterrence,
- (e) applies to behavior that already is a crime,
- (f) has an alternate purpose to which it may rationally be connected,
- (g) appears excessive in relation to the alternate purpose assigned.

See 372 U.S. at 168-169.

Courts may consider legislative motivations in areas such as racial discrimination, where the risks of misreading legislative intent may not be as high. See, e.g., *Hunter v. Underwood*, 53 U.S.L.W. 4468 (Apr. 16, 1985) (testimony of historians concerning 1901 Alabama Con-

stitutional Convention revealed uncontroverted discriminatory intent behind state constitution's disenfranchisement of certain convicts). However, where a party contests an ordinance on grounds of suppressive intent, the traditional test set forth in *O'Brien*, *Trop*, and *Kennedy* controls.

The thrust of *O'Brien* and its predecessors is to preempt the extensive second-guessing of police power ordinances that would go with an unlimited search for "illicit motivations". The Ninth Circuit's holding in *Playtime Theaters* gives adult entertainment businesses a formidable weapon with which to frustrate legitimate efforts by localities to control the otherwise unrestrained spread of adult bookstores and theaters, or any other commercial enterprises which might be able to lay some claim of First Amendment protection. Vendors of adult materials may now, in the course of §1983 suits or similar actions, force local governments to prove the existence of a negative; that is, to show that the legislature as a whole did not in fact intend to suppress free expression.

Unfortunately, the *Playtime Theaters* court did not offer any guidance on how a locality, once branded with an inference of suppressive intent, can prove that it didn't intend to suppress. *Amicus* Jackson County submits that the Ninth Circuit couldn't offer such guidance because no locality could reasonably expect to meet such a burden of proof. The "inference" is in fact a conclusive presumption, one that is derived by a detached court removed in time from the statute's enactment and based upon the statements of individual legislators—a practice rejected in *O'Brien*.

The degree to which the Ninth Circuit has departed from *O'Brien* is illustrated by the case law relied upon in the *Playtime Theaters* opinion. The *Playtime Theaters*

court based its new burden of proof on three other Ninth Circuit opinions: *Tovar v. Billmeyer*, 721 F.2d 1260 (1983), *Ebel v. City of Corona*, 698 F.2d 390 (1983), and *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211 (1984). The common holding in all of those cases was that the enacting body must have a substantial governmental interest unrelated to the suppression of free expression. That holding is firmly rooted in this Court's decisions and is not questioned by Jackson County. What Jackson County questions is the *Playtime Theaters* court's mutation of that basic principle into a carte blanche expedition into the amorphous world of legislative motives. It is one thing to say that government has limited power to suppress free expression (*Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), cited in *Ebel*, 698 F.2d at 393); it is an entirely different matter to then say that a municipality may be required to substantiate a benign legislative motive for every zoning ordinance in which an aggrieved landowner can show an "inference" of suppressive intent.

Perhaps the greatest danger posed by the *Playtime Theaters* inference is that it logically would apply to the large number of police power ordinances that local governments enact for matters other than zoning. Political subdivisions such as Jackson County necessarily enact and amend laws to protect the public in, e.g., its use of public parks and streets. Similarly, localities regularly implement legislation concerning public nuisances, condemnation, and quasi-criminal offenses such as disorderly conduct. If, as the Ninth Circuit suggests, a party seeking to invalidate a zoning ordinance may do so by invoking the statements or arguments of individual legislators, Jackson County questions its ability to enact and effectively

implement other basic police power ordinances. The *Playtime Theaters* holding is so broad that even existing police power ordinances are vulnerable to the vague inferences of illicit motivations to which the Ninth Circuit gives so much impact.

Notably, this Court recently upheld federal police power regulation in the form of a National Park Service rule which prohibited camping in certain national parks. *Clark v. Community for Creative Non-Violence*, 468 U.S., 82 L. Ed. 2d 221 (1984). Importantly, *Clark* upheld the regulation as a reasonable time, place, and manner restriction and based this holding on the effect—not subjective intent—of the regulation. 82 L. Ed. 2d at 228 (regulation not a ban on sleeping generally, given existence of alternative sites for camping).

Clark reflects this Court's traditional emphasis on the facial review of legislation, especially in the area of police power. Given the dangers of ill-defined searches for suppressive intent or other illicit motivations, no other approach would be consistent with the separation of powers mandated by the Constitution. A reviewing court may not seek to void police power ordinances based upon an inference of suppressive intent. The court must instead confine itself to the more proper role of determining whether the enactment's terms and effect comply with constitutional criteria.

B. A zoning ordinance placing situs restrictions on specific categories of land use—including adult entertainment businesses—does not fall within the class of cases allowing a search for suppressive intent.

1. Zoning ordinances are classic examples of local police power and as such are prima facie regulatory ordinances.

By definition, zoning laws are regulatory devices implemented pursuant to police power and in furtherance of public welfare. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Deprivation of property rights does not independently alter the nature or validity of this power. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962). Indeed, even where the regulation is unreasonable or exceptionally onerous, the offending ordinance would be struck down as an unconstitutional taking, not as a punitive ordinance. Cf. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), *Wermager v. Cormorant Township Board*, 716 F.2d 1211 (8th Cir. 1983). Correspondingly, regulatory acts such as zoning ordinances do not have the penal indicia listed in *Kennedy*; e.g., scienter, historic status as punishment, etc.

The decision on how and in what form the police power will be exercised is uniquely a legislative one. *Hawaii Housing Authority v. Midkiff*, U.S., 81 L. Ed. 2d 186 (1984), concisely summarizes the concept of judicial deference to legislative determinations on police power. Although *Midkiff* dealt with the constitutionality of an eminent domain statute, it necessarily involved an assessment of how courts should treat the broader subject of police power. The Court's opinion relies heavily upon *Berman v. Parker*, 348 U.S. 26 (1954), and that case's discussion of police power:

We deal, in other words, with what traditionally has been known as police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, *when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs.*

348 U.S. at 32, emphasis supplied.

Thus, in considering an ordinance which on its face is an exercise of police power—surely a “legitimate governmental purpose” within the meaning of *Trop*—a court may not look beyond the ordinance's face for possible suppressive intent of councilmen supporting the ordinance. Even if zoning ordinances regulating the location of adult bookstores and theaters do not garner the deference given other police power ordinances from *Village of Euclid* to *Midkiff*, they at least constitute non-penal ordinances within the meaning of *O'Brien*.

2. The regulatory nature of zoning ordinances is not altered by their application to adult entertainment businesses.

The nature of Renton's zoning ordinance—regulation of adult entertainment locations—does not alter the *O'Brien* standard of review. Under *Paris Adult Theatre*

I v. Slaton, 413 U.S. 49 (1973), obscene material is not protected by the First Amendment as a limitation on state police power by virtue of the Fourteenth Amendment. In fact, this Court recognized certain inherent state interests "in stemming the tide of commercialized obscenity. . . ." 413 U.S. at 57. Such interests include that of "the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." 413 U.S. at 58.

Thus, nothing about First Amendment/pornography cases alters the degree of deference traditionally granted to exercises of police power. Indeed, *Paris Adult Theatre I* suggests a built-in deference to pornography-related ordinances, given the recognized community interest in the regulation of pornography. Although pornography ban cases like *Paris Adult Theatre I* differ from "adult entertainment" regulation cases such as in *Playtime Theaters* (due mainly to the evidentiary findings required in "ban" ordinances), the rationale for deference remains the same. In lieu of something on the face of the ordinance suggesting that *ex post facto* punishment is being imposed upon specific parties, the *Paris Adult Theatre I* rationale controls.

C. As a matter of public policy, statements by legislators should not be used as barometers for suppressive intent.

As a practical matter, it is unfair to hold local legislators to superhuman standards of rationality and diplomacy, especially if the yardstick is that of the public debate on the challenged ordinance. Legislators do not always speak with legal precision or diplomatic aplomb; nor, as elected representatives, should they be expected to place such oratorical concerns above the needs of their constitu-

ents as long as their actions comport with constitutional norms. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), which established absolute immunity for legislators from civil liability in damages, this Court made the observation that "one must not expect uncommon courage even in legislators. . . . In times of political passion, dishonest or vindictive motives are readily attributed legislative conduct and as readily believed. Courts are not the place for such controversies." 341 U.S. at 377-378.

Correspondingly, courts are not the place for seeking underlying motivations for a zoning restriction on the location of adult bookstores and theaters, especially where that ordinance on its face is a valid exercise of police power lacking any facial indicia of punitive intent. To hold otherwise would be to signal other localities that anything said during legislative deliberations can be turned upon the locality in a later civil rights action and, perhaps, on the individual legislators. Such scrutiny would chill legislative deliberations (at least on the record) and subjugate legislative policy judgment to that of the judiciary. To do so would be foreign to the representative democracy characterized by local governments and anathema to the concept of separation of powers.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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MOTION FILE
JUN 28 1985

No. 84-1360

19

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On Appeal from the United States Court of Appeals
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**MOTION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF OF THE NATIONAL INSTITUTE
OF MUNICIPAL LAW OFFICERS**

Pursuant to Rule 36 of the Rules of the Court, amicus National Institute of Municipal Law Officers [NIMLO], for its 1,700 member local governments, respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of appellants City of Renton, *et al.* Appellants have consented to the filing of this brief, but appellees have withheld consent.

The state political subdivisions that are members of *amicus* operate NIMLO through their chief legal officers,

variously called city attorney, county attorney, city or county solicitor, corporation counsel, or director of law. The appellant, City of Renton, Washington, is a member of NIMLO. The accompanying brief is signed by the attorneys constituting the governing body of NIMLO, both on behalf of NIMLO and on behalf of each of their cities.

The local government attorneys who participate in the work of NIMLO are called upon to advise their local governing bodies on proposed adult-use zoning measures similar to that at issue in this case. These attorneys have applied the principles of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and they would be called upon to advise their governing bodies under the standards set forth by the court of appeals below. NIMLO and its member municipalities are greatly concerned that no existing local government adult-use zoning ordinance can survive under the standards of the decision below. Of special concern is the holding that Renton may not rely exclusively on other cities' experiences with the blight caused by over-concentration of adult-uses, but must allow adult-uses to begin to proliferate in Renton before the City can legislate to remedy the resultant blight.

Another aspect of the decision of the court of appeals in this case also concerns municipal attorneys. One of the principal functions of local government attorneys in this area of the law is to advise their councils on the state of the law and its application to the peculiar facts of land use in their municipalities. They expect challenges to many land use ordinances and they advise their councils on the probable outcome of litigation. Where, as here, the threat or actuality of litigation favors a modification of an ordinance, the attorneys so advise their councils. Finally, these attorneys defend the ordinances in court. When a district court has found that a land use ordinance permits

adequate alternative sites for an adult-use, these municipal attorneys expect that finding to receive deference on appeal unless it is clearly erroneous. That expectation plays a large part in the ability of these attorneys to advise their councils whether to retain, modify, or repeal a land use ordinance while a challenge is on appeal.

The court of appeals in this case treated as subject to de novo review the district court's finding that application of City of Renton's adult-use ordinance still left adequate alternative sites for the appellee Theatre's use. Under this rule, municipal attorneys no longer can advise their councils adequately on a course of action pending appeal, because legal issues no longer can be isolated from factual ones in determining the likelihood of affirmance of a district court judgment upholding an adult-use zoning ordinance. Municipal councils and their lawyers will have difficulty complying with the law in this area, when the record on appeal counts for nothing and an appeal is no more than "another roll of the dice" for the litigants.

For these reasons, *amicus* seeks leave to file this brief, in order to assist the Court in its consideration of this case.

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**IN THE
Supreme Court of the United States
OCTOBER TERM, 1984**

No. 84-1360

THE CITY OF RENTON, *et al.*,
Appellants,

v.

**PLAYTIME THEATRES, INC.,
a Washington Corporation, *et al.*,**
Appellees.

**On Appeal from the United States Court of Appeals
for the Ninth Circuit**

**BRIEF AMICUS CURIAE OF THE NATIONAL
INSTITUTE OF MUNICIPAL LAW OFFICERS**

INTEREST OF THE AMICUS CURIAE

The interest of the amicus is set forth in part in the Motion for Leave to File this brief.

In addition, the inability of municipal attorneys to rely any longer on adequately supported findings by a district court will tempt local governments to repeal any regulation of adult uses that is challenged and appealed. Most challenges to adult-use zoning measures are brought under the provisions of the Civil Rights Act of 1871, 42 U.S.C. § 1983, as was this case. The ready availability of

attorney's fees on appeal, and the inclusion in a fee award of work done in the trial court by a plaintiff who loses there but obtains a reversal on appeal, will force local governments to withdraw their land use measures unless some assurance can be given of a likelihood of successfully defending the measure in litigation. One basis of assurance, respect for adequately supported findings of fact, has been eliminated in all land use cases with First Amendment implications by the decision of the court of appeals below.

Because reversal of the decision below will restore the ability of local governments to balance the interests of their citizens in avoiding the blight accompanying over-concentration of adult uses against the First Amendment-based interest of purveyors of adult entertainment, NIMLO and the individual cities that the undersigned represent as municipal attorneys, respectfully urge this Court to reverse the judgment below.

STATEMENT OF THE CASE

We limit our discussion of the record to those portions of the district court's findings for which reversal by the court of appeals prompts our above-recited concerns.

The district court recited the finding of Renton's ordinance that "[e]xperience in numerous other cities . . . has shown that location of adult entertainment land uses degrades the quality of the areas of the City in which they are located The skid row . . . effect, which is evident in certain parts of Seattle and other cities, will have a significantly larger effect on the City of Renton than other major cities due to the relative sizes of the cities." Juris. St., at 30a. The court then found that "[t]here was no

evidence adduced to show that the secondary effects of adult land uses would be different or lesser in Renton than in Seattle, Tacoma, or Detroit." Juris. St., at 28a.

The district court also found that, under Renton's adult-use dispersal ordinance, "[p]laintiffs are not virtually excluded from Renton by being confined to 'the most unattractive, inaccessible, and inconvenient' areas" of the City. Juris. St., at 28a.

With respect to the first of the district court's findings, the court of appeals concluded:

"Renton has not studied the effects of adult theaters and applied any such findings to the particular problems or needs of Renton. The studies done by Detroit on the problems of concentrating adult uses are simply not relevant to the concerns of the Renton ordinance — the proximity of adult theaters to certain other uses."

Juris. St., at 19a.

The court of appeals addressed the second finding as follows:

"The District Court found that 520 acres in Renton were available [under the ordinance] for adult theater sites. Although we do not quarrel with the conclusion that 520 acres is outside the restricted zone, we do not agree that the land is available."

Juris. St., at 13a.

SUMMARY OF ARGUMENT

The decision of the court of appeals in this case would work an anomaly on the local legislative process. Budget

constraints at all levels of government are, perhaps, most noticed in cutbacks on services at the local level. Yet, the court below would force local taxpayers to adopt an inefficient method of dealing with common governmental problems; local officials either would have to authorize unnecessary expenditures to undertake superfluous impact studies or they could elect to assume the cost of abating an avoidable nuisance that was allowed to flourish. A third alternative — to do nothing — would be unacceptable, as the quality of life in their local jurisdictions would suffer in the same way as has been experienced in other localities facing similar issues.

The City of Renton had adequately studied both the problem and potential solutions for the zoning of adult businesses. In so doing, Renton, like many other local governments,¹ has tried to develop an ordinance that is both effective and in compliance with the constitutional limitations on such regulations. The fact that the district court also found that the City's ordinance made sites available for adult business uses further supplements the legislative record, and the appellate court should not be permitted to disregard the trial court's inquiry and conclusions.

¹See, Brief of Amici Curiae City of Whittier in Support of Juris. St., at 2 n.3; Brief of Amici Curiae National League of Cities in Support of Plenary Hearing, at 10 n.18.

ARGUMENT

I

THE COURT OF APPEALS REJECTED TRADITIONAL METHODS OF LEGISLATIVE FACT-FINDING WHICH HAVE FORMED THE BASIS OF CONSTITUTIONALLY APPROVED LEGISLATION BY THE FEDERAL AS WELL AS LOCAL GOVERNMENTS.

In collecting the empirical studies from Detroit, Seattle and elsewhere, and assessing the validity of the studies to the smaller City of Renton, the City Council of Renton engaged in a type of legislative fact-finding which has long been approved by this Court. That local governing bodies consider ordinances passed by other communities and adapt them to their own unique local circumstances is obvious enough from the record of this case and the opinions in other adult-use zoning cases cited by the court of appeals, Juris. St., at 18a-19a.

Here, Renton's Council considered the experiences of larger cities and concluded that the blighting effect of over-concentration of adult uses would be great in Renton. The district court found that this legislative finding was uncontradicted in the record of the case.

The only thing more Renton could have done — and apparently this is what the court of appeals would have required it to do — was to allow adult theaters to concentrate more densely than the proposed ordinance would permit² and then measure the blight over time. There is

²It is important to bear in mind that Renton did not prohibit adult uses; it merely required them to be dispersed.

nothing in the First Amendment which requires a government to permit a nuisance to flourish before restricting it. If the balance struck by local regulation is a constitutional balance, one local government may act based on the experiences of others.

If Renton's legislative fact-finding is insufficient, then the constitutionality of other federal³ as well as state⁴ and local⁵ legislation, is called into question. It is common for legislatures to assess the impact of an evil in areas other than their own, and to assess the effect various remedies have had on the evil. Moreover, it is common for legislatures to enact a remedial scheme with no empirical studies at all, based solely on the inferences which the scientific or social scientific community makes in predicting causes and effects. All this is rejected by the conclusions of the court of appeals below, and the effect of affirmation of these conclusions by this Court will not be limited to First Amendment cases.

We think this view, a necessary consequence of the holding of the court of appeals in this case, is erroneous, and we urge this Court to reject it, by reversing the judgment below upon which it rests.

³*Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966) (appropriate for Congress to assess various considerations regarding limitation on right to vote; recognizing realities familiar to the legislators).

⁴*Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 215 (1983) (issue of economic uncertainties engendered by nuclear waste disposal lends itself to generalized decisionmaking).

⁵*Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 54 & n. 6, 55 & n. 8 (1976) (city council finding of undesirability of nuisance concentration generally; no evidence of study of concentration in Detroit specifically).

II

THE COURT OF APPEALS IGNORED THE TRADITIONAL RESPECT APPELLATE COURTS HAVE SHOWN FOR THE ADEQUATELY SUPPORTED FINDINGS OF DISTRICT COURTS.

The court of appeals substituted its view, of whether the 520 acres outside the prohibited perimeter of Renton's dispersal ordinance were "available" for adult uses, for the fully supported findings of the district court.

In so doing, the court of appeals acted contrary to Rule 52 of the Federal Rules of Civil Procedure and repeated decisions of this Court.⁶

In zoning as in other cases, the courts — and this Court — have found that determination of what areas are "available" under an ordinance for a particular use, is a factual issue, not a legal one.⁷

Indeed, the lack of appropriate deference to the district court's findings exacerbates the court of appeals' rejection of Renton's local circumstances. This Court has commented before on the paucity of local legislative histories.⁸

⁶*E.g.*, *Rogers v. Lodge*, 458 U.S. 613 (1982) (finding of discrimination in maintenance of at-large election system); *Columbus Board of Education v. Penick*, 433 U.S. 449, 468 (1979) (Burger, C.J., concurring) (school systemwide discriminatory intent); *Pullman-Standard v. Swint*, 456 U.S. 273, 286 (1982) (intentional employment discrimination) ("Rule 52 . . . does not make exceptions or purport to exclude certain categories of factual findings . . .").

⁷*See*, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981); *Young v. American Mini Theatres*, 427 U.S. 50, 71 n. 35 (1976); *Lydo Enterprises, Inc. v. Las Vegas*, 745 F.2d 1211 (9th Cir. 1984); *Alexander v. Minneapolis*, 698 F.2d 936, 938 (8th Cir. 1983).

⁸*Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 72-4 (1981); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 468, 470 (1981) (search for purpose of statute likely to be elusive).

Here, the appellee has made the same complaint. Mot. to Affirm, at 3. But in this case, the district court held an extensive hearing at which city officials, officials of the appellee, and the appellee's attorney, supplemented the legislative record. See Juris. St., at 9. The lack of published local legislative histories makes imperative the kind of factual inquiry which the district court undertook in this case. In this kind of case, preeminently, the courts of appeals should not — and should not be permitted to — violate Fed. R. Civ. P. 52 by substituting their own opinions of the facts for that of the district courts.

CONCLUSION

Had the court of appeals applied Fed. R. Civ. P. 52 properly, it would have affirmed the finding that adequate alternate sites were available for adult uses in Renton within the constraints of the City's dispersal ordinance. Thus the limitation in *Young v. American Mini Theatres* perceived by the court of appeals, see Juris. St., at 13a & n. 11, is not applicable to the record of this case. If the court of appeals had properly considered Renton's traditional legislative fact-finding — and the district court's finding of fact on the similarity of other cities' experience to Renton's circumstances, Juris. St., at 30a — it would have affirmed the district court's conclusion that Renton's dispersal ordinance passed constitutional muster.

Because it did neither, the court of appeals erred, and the judgment should be reversed with instructions to affirm the judgment of the district court upholding the ordinance.

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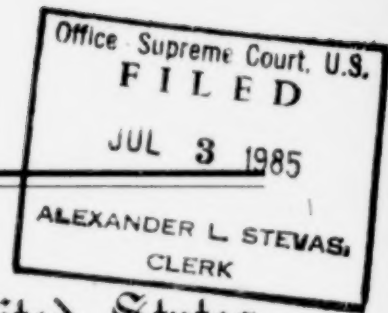
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No. 84-1360



IN THE
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OCTOBER TERM, 1984

CITY OF RENTON, et al.,

Appellants,

v.

PLAYTIME THEATERS, INC., et al.,

Appellees.

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NINTH CIRCUIT

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| <i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964) | 7, 16, 22 |

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| <i>Northend Cinema, Inc. v. City of Seattle</i> , 90 Wash.2d 709, 585 P.2d 1153 (1978) | 13, 23 |
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INTEREST OF AMICUS CURIAE¹

The Freedom Council Foundation is gravely concerned about the threat posed by obscenity and nonobscene erotic material² to the family and to society generally. The Court's disposition of this case may dramatically affect the power of cities and states to regulate that threat.

The Freedom Council Foundation is a nonprofit corporation organized to defend, restore, and preserve religious liberties, family rights, and other freedoms guaranteed by the Constitution. The Foundation is affiliated with the Freedom Council, which has associated organizations in each of the 50 states, and student groups on over 70 college campuses. The Foundation is also related to the Christian Broadcasting Network, which is one of the two largest cable television networks in the United States, reaching over 13 million homes. The Council and Foundation have filed amicus curiae briefs in *Lynch v. Donnelly* and other cases before this Court and other courts.

The counsel of record for Amicus Curiae, Wendell R. Bird, concentrates in constitutional litigation, has published articles on the First Amendment in the *Yale Law Journal* and *Harvard Journal of Law & Public Policy*, and is an Adjunct Professor at Emory University School of Law in constitutional law. The Foundation hopes that this expertise will be of assistance to the Court in this case.

1. A motion for leave to file accompanies this brief, pursuant to S.Ct. Rule 36.2.

2. Amicus Curiae, in arguing that nonobscene erotic material is not fully protected expression under the reasoning of *Young v. American Mini Theatres, Inc.*, assumes arguendo but does not concede that such material is properly viewed as even partly protected by the First Amendment.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NO. 84-1360

CITY OF RENTON, et al.,

Appellants,

v.

PLAYTIME THEATERS, INC., et al.,

Appellees.

STATEMENT OF THE CASE

This appeal involves the constitutionality of a municipal zoning ordinance regulating adult theaters that is very similar to the zoning ordinance upheld by this Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opinion of Stevens, Burger, White & Rehnquist, JJ.). The Ninth Circuit summarized the City of Renton's ordinance as follows:

In April, 1981, the City of Renton enacted ordinance number 3526 which prohibited any "adult motion picture theater"¹ within one thousand feet of any residential zone or single or multiple family dwelling, any church or other religious institution, and any public park or area zoned for such use. The ordinance further prohibited any such theater from locating within one mile [later amended to one thousand feet] of any public or private school.³

3. The Ninth Circuit quoted the ordinance's definitions as follows:

1. The first ordinance defined an "adult motion picture theater" as an enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characterized by an emphasis on matter depict-

Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 529-30 (9th Cir. 1984). The "distinguished or characterized by" language, and the "specified sexual activities" and "specified anatomical areas"⁴ definitions, are essentially identical to the ordinance upheld in *Mini Theatres*. The city heard the testimony of several witnesses before passing the ordinance, and later added numerous reasons that were generally based on pornography's blight on neighborhoods and families (particularly children).⁵ Because Renton is a small town, it did not undertake a costly study of probable adult theater blight; and because it is a suburb of Seattle, it assumed it would encounter harms similar to those experienced by Seattle.⁶

ing, describing or relating to "specified sexual activities" or "specified anatomical areas" as hereafter defined, for observation by patrons therein.

The ordinance defined these terms as follows:

2. "Specified Sexual Activities":

- (a) Human genitals in a state of sexual stimulation or arousal;
- (b) Acts of human masturbation, sexual intercourse or sodomy;
- (c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

3. "Specified Anatomical Areas":

- (a) Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and
- (b) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

The second ordinance expanded the defined term of "used" as: a continuing course of conduct of exhibiting "specific [sic specified] sexual activities" and "specified anatomical area[]" in a manner which appeals to a prurient interest.

Id. at 529 n.1.

4. The term "erotic material" is used throughout this brief, as in *Mini Theatres*, to refer to nonobscene material "distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas'"—i.e., to nonobscene sexually explicit material.

5. Br. of Appellants at 6; 748 F.2d at 530-31 n.3.

6. Br. of Appellants at 7-8; 748 F.2d at 531 n.3.

SUMMARY OF THE ARGUMENT

This pornography zoning ordinance should be upheld as constitutional on the ground that nonobscene erotic material is only partially protected expression, under the analysis of the four justice plurality in *Young v. American Mini Theatres, Inc.*⁷ There, Justice Stevens, joined by Chief Justice Burger, and Justices White and Rehnquist, held that nonobscene "erotic material" does not constitute fully protected expression:

[T]here is surely a *less vital interest* in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance

. . .

. . .

[I]t is manifest that society's *interest in protecting this type of [erotic] expression is of a wholly different, and lesser, magnitude* than the interest in untrammelled political debate that inspired Voltaire's immortal comment. . . . Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.⁸

This partial protection of erotic material is analogous to the partial level of constitutional protection of commercial advertising, which this Court has consistently acknowledged over the past decade. Partial protection permits a greater degree of regulation than fully protected expression would allow, and requires the upholding of regulation of erotic material such as Renton's ordinance for pornography zoning.

7. 427 U.S. at 70-71.

8. *Id.* at 61, 70-71 (emphasis added).

ARGUMENT

ZONING REGULATION OF NONOBSCENE EROTIC MATERIAL IS CONSTITUTIONAL UNDER THE FIRST AMENDMENT, BECAUSE SUCH EROTIC MATERIAL IS ONLY PARTIALLY PROTECTED EXPRESSION.

The brief discusses (A) the only partial protection of the First Amendment for nonobscene erotic material and commercial advertising; (B) the lack of a burden on such erotic material from greater regulation, including Renton's zoning regulation, that partial protection allows; and (C) the justification for any nonsuppressive burden by the legitimate state interest test or commercial advertising test that applies to partially protected expression.

I. ONLY PARTIAL PROTECTION OF THE FIRST AMENDMENT EXTENDS TO NONOBSCENE EROTIC MATERIAL AND COMMERCIAL ADVERTISING.

The full First Amendment protection is not applied to every spoken or printed word or illustration, because that Amendment does not extend absolutely to every utterance.⁹ No first Amendment protection extends to fighting words,¹⁰ to terroristic or extortionate threats,¹¹ to immediate seditious advocacy,¹² or to criminally instrumental words,¹³ because such utterances are merely verbal conduct tantamount to nonverbal physical attack, subversion, or crime. Similarly, no speech or press protection extends to noninformative or false

9. *E.g.*, *Miller v. California*, 413 U.S. 15, 23 (1973); *Konigsberg v. State Bar*, 366 U.S. 36, 49-51 (1961).

10. *E.g.*, *Cox v. Louisiana*, 379 U.S. 559, 563 (1965); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

11. *E.g.*, *Watts v. United States*, 394 U.S. 705, 707 (1969); *Masson v. Slaton*, 320 F. Supp. 669, 672 (N.D. Ga. 1970).

12. *E.g.*, *Scales v. United States*, 367 U.S. 203, 228-29 (1961); *Dennis v. United States*, 341 U.S. 494, 501-02 (1951) (plurality opinion).

13. *E.g.*, *Cox v. Louisiana*, 379 U.S. 559, 563 (1965); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

commercial advertising,¹⁴ to nonprivileged defamation,¹⁵ or to obscenity and child pornography.¹⁶ Obscene material is not protected speech or press because it, taken as a whole, is physical stimulation through nonideational verbal or pictorial incitement.¹⁷

A. *This Court Has Recognized a Category of Partially Protected Expression such as Commercial Advertising.*

While the "First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent,"¹⁸ that does not require that the freedoms of speech and press *fully* protect other expression that lacks such serious ideational or communicative value and instead is wholly commercial, essentially conduct, or erotic. Only *partial* First Amendment protection extends to primarily commercial but informative advertising, to privileged defamation, and to erotic publications and films.

For example, "the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression," as this Court has held in many

14. *E.g.*, *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n*, 447 U.S. 557, 563 (1980); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

15. *E.g.*, *New York v. Ferber*, 458 U.S. 747, 763 (1982); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952).

16. *E.g.*, *Brockett v. Spokane Arcades, Inc.*, ____ U.S. ____ (1985); *New York v. Ferber*, 458 U.S. at 764; *Miller v. California*, 413 U.S. at 23; *Roth v. United States*, 354 U.S. 476, 481, 485 (1957); Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979) (defending two-level approach to obscenity as unprotected).

17. *E.g.*, D. BARBER, *PORNOGRAPHY AND SOCIETY* 91 (1972); Schauer, *supra* note 16, at 922-23 ("the prototypical pornographic item on closer analysis shares more of the characteristics of sexual activity than of the communicative process" and is "a sexual surrogate").

18. *E.g.*, *Miller v. California*, 413 U.S. at 34.

decisions such as *Bolger v. Youngs Drug Products Corp.*,¹⁹ although advertising enjoys some First Amendment protection.²⁰

In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," *Virginia Pharmacy, supra*, at 761, we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. 425 U.S., at 771 n.24. We have not discarded the "common-sense" distinction between speech proposing a commercial transaction . . . and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a *limited measure of protection*, commensurate with its *subordinate position* in the scale of First Amendment values. . . .²¹

Because of this partial protection, the First Amendment "allow[s] modes of regulation that might be impermissible in the realm of noncommercial expression."²²

Similarly, only partial First Amendment protection extends to privileged defamation. While false statements are

19. 463 U.S. 60, 77 L.Ed.2d 468, 476 (1983).

20. *E.g.*, *Bates v. State Bar*, 433 U.S. 350, 363-64 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

21. *E.g.*, *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978) (emphasis added). *Accord*, *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n*, 447 U.S. at 562-63; *Friedman v. Rogers*, 440 U.S. 1, 10-11 n.9 (1979); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 771-72 n.24; see generally Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 222-54 (1976).

22. *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. at 556. *Accord, e.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 771-72 & n.24; Section III(A) *infra*.

not fully protected speech,²³ this Court has ruled that some "erroneous statement . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,'"²⁴ which the Court has interpreted as "extending a measure of strategic protection to defamatory falsehood."²⁵ Hence some false statements are "constitutionally privileged" and thereby effectively given partial protection from suppression and some regulation.²⁶ Like partially protected commercial advertising, however, privileged defamation can be subjected to state regulation²⁷ that for fully protected speech and press would not be permitted.

B. *This Court Has Placed Nonobscene Erotic Material in that Partially Protected Category.*

Although the "portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press,"²⁸ that principle does not mean that sexual acts or similar conduct are protected by the First Amendment at all,²⁹ and it does not demand the same degree of protection for erotic material as for traditionally protected speech and press.³⁰ Instead, only partial First Amendment protection ex-

23. See, *e.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 771; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

24. *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964).

25. *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. at 342.

26. This is true for false statements about public figures without actual malice, and about private persons without the requisite degree of fault. *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. at 347; *New York Times Co. v. Sullivan*, 376 U.S. at 279-80.

27. *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. at 347; Section II(C) *infra*.

28. *Roth v. United States*, 354 U.S. at 487 (footnote omitted). *E.g.*, *Schad v. Village of Mt. Ephraim*, 452 U.S. 61, 66 (1981) (nudity).

29. *E.g.*, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 & n.13 (1973); *Lovisi v. Slayton*, 539 F.2d 349, 351-52 (4th Cir. 1976).

30. Ascribing only partial First Amendment protection to erotic material does not reduce the constitutional protection for such expression; instead, it results from the relatively recent shift of erotic material from the unpro-

tends to nonobscene erotic material as defined in Renton's ordinance.

This Court acknowledged the "lesser" First Amendment protection for nonobscene erotic material in the plurality opinion in *Young v. American Mini Theatres, Inc.*:

[T]here is surely a *less vital interest* in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance³¹

[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's *interest in protecting this type of expression is of a wholly different, and lesser, magnitude* than the interest in untrammelled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.³²

The Court's finding of a "lesser" First Amendment protection for erotic material was clearly the premise for its findings that reasonable regulation of such material does not abridge freedoms of speech and press and that content-based regulation

tected category to some protection. *E.g.*, Schauer, *supra* note 16, at 907-08 & n.50 (courts have given First Amendment protection but reduced its level in such areas as nonobscene erotic material and nonobscene indecent language); compare F. SCHAUER, *THE LAW OF OBSCENITY* 21-22 (1976) (in obscenity prosecutions in the nineteenth century, "almost anything that concerned sexual relationships in any way was presumed to be obscene") and *Commonwealth v. Holmes*, 17 Mass. 336 (1821) (example of same) with *Miller v. California*, 413 U.S. at 24 (narrow test for obscenity).

31. *Id.* at 61 (plurality opinion) (emphasis added).

32. *Id.* at 70 (plurality opinion) (emphasis added).

of sexually explicit material does not violate equal protection.³³

Other decisions, besides *Mini Theatres* and the advertising and libel analogies, support the proposition that erotic material is only partially protected expression. This Court in *FCC v. Pacifica Foundation*,³⁴ in sustaining a statutory prohibition against broadcast of nonobscene "indecent" speech under the First Amendment,³⁵ permitted regulation of sexually explicit expression³⁶ that would not have been constitutionally permissible for fully protected speech or press. That ruling indicates a lesser First Amendment protection for such nonobscene material; and the plurality opinion stated that such "patently offensive references to excretory and sexual organs and activities" "lie at the periphery of First Amendment concern," and that "[t]heir place in the hierarchy of First Amendment values was . . . 'no essential part of any exposition of ideas'"³⁷ The Court in *California v. LaRue*,³⁸ in upholding a regulation of sexually explicit dancing, films, and pictures in bars with liquor licenses, also recog-

33. *E.g.*, *id.* at 96 (dissenting justices' "forthright rejection of the notion that First Amendment protection is diminished for 'erotic materials'"); *Stansberry v. Holmes*, 613 F.2d 1285, 1288 (5th Cir.) ("Young affords certain 'speech' activities lesser protection"), *cert. denied*, 449 U.S. 886 (1980); Note, *Constitutional Law—First Amendment—Content Neutrality*, *Young v. American Mini Theatres, Inc.*, 28 CASE W. RES. L. REV. 456, 478 (1978) (same); Comment, *The Supreme Court, 1976 Term—Constitutional Law*, 90 HARV. L. REV. 58, 200 (1976) (same).

34. 438 U.S. 726 (1978).

35. *Id.* at 744 (plurality opinion); *id.* at 756, 761 (Powell, J., concurring).

36. *Id.* at 743.

37. *Id.* at 743, 746.

38. 409 U.S. 109, 118 (1972). See *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 715-18 (1981) (upholding prohibition of topless dancing in establishments with liquor licenses as "a reasonable restriction"); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding regulation, *inter alia*, of "Group D cabarets" with partially nude performance, on the basis of legitimate state interest); cf. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) (overturning ban on all live entertainment [whether or not partially protected] in commercial zones); *Doran v. Salem Inn, Inc.*, 422

nized the lesser First Amendment protection of such erotic entertainment and materials as compared with political, artistic, literary, and scientific speech and press. The majority opinion said that, while "at least some of the performances [and films and pictures] to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression," they are not "the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater."³⁹ Consequently, "as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases."⁴⁰

The obscenity decisions, in *Miller v. California*⁴¹ and other cases, have implicitly found less constitutional protection for sexually explicit material on the periphery of obscenity. These decisions have permitted variation in the three factors constituting obscenity, with the effect of shifting erotic material into the obscenity category in some cases and out of that unprotected category in others; such variation would not be permissible for fully protected speech and press. That variation includes patent offensiveness as determined by different community standards,⁴² prurient appeal as influenced by the deviant nature of the recipient group,⁴³ and all three *Miller* factors as adjusted for the minority age of the recipient individuals.⁴⁴

The reason why full First Amendment protection does not apply to sexually explicit material is that primarily erotic

U.S. 922, 933-34 (1975) (overturning regulation not limited to liquor licensed establishments).

39. 409 U.S. at 118.

40. *Id.* at 117. *Accord*, *Doran v. Salem Inn, Inc.*, 422 U.S. at 932.

41. 413 U.S. 15, 25-26 (1973).

42. *Id.* at 30.

43. *E.g.*, *Mishkin v. New York*, 383 U.S. 502, 508-09 (1966).

44. *E.g.*, *Ginsberg v. New York*, 390 U.S. 629, 638 (1968); *see New York v. Ferber*, 458 U.S. 747 (1982) (child pornography).

books, magazines, and motion pictures consist of commercial noncommunicative sexual conduct, and that purchasers and authors and vendors of such erotic materials are carrying on commercial noncommunicative action rather than sincerely conveying any First Amendment expression.⁴⁵ As with advertising, anything more than partial protection for erotic material "could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech."⁴⁶

II. NO BURDEN ON FIRST AMENDMENT EXPRESSION ARISES FROM ZONING REGULATION OF NONOBSCENE EROTIC MATERIAL, BECAUSE GREATER REGULATION IS CONSTITUTIONALLY PERMISSIBLE FOR SUCH EROTIC MATERIAL.

A. *Greater Regulation Is Permissible for Commercial Advertising and Erotic Material than for Fully Protected Expression.*

For commercial advertising, this Court's decisions "allow[] modes of regulations that might be impermissible in the realm of non-commercial expression."⁴⁷ The state can prohibit misleading and deceptive as well as false advertisements,⁴⁸ suppress advertising concerning illegal transac-

45. *See, e.g.*, *Young v. American Mini Theatres, Inc.*, 427 U.S. at 70; *California v. LaRue*, 409 U.S. at 118 ("in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication"); Schauer, *Response: Pornography and the First Amendment*, 40 U. PITT. L. REV. 605, 608 (1979) ("none of the philosophical justifications of a distinct concept of freedom of speech would put direct sexual excitement within the confines of that principle"); Schauer, *supra* note 16. Erotic material is closer to obscenity, prostitution, sexual solicitation, and non-artistic public nudity than to traditional speech.

46. *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n*, 447 U.S. at 563 n.5, *quoting Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 456.

47. *Friedman v. Rogers*, 440 U.S. at 10-11 n.9, *quoting Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 456. *Accord, e.g.*, *In re R.M.J.*, 455 U.S. 191, 203 (1982).

48. *E.g.*, *Bolger v. Youngs Drug Products Corp.*, ___ U.S. ___, 77 L.Ed.2d at 479; *In re R.M.J.*, 455 U.S. at 203; *Friedman v. Rogers*, 440 U.S.

tions,⁴⁹ require necessary warnings or disclaimers on commercial advertisements,⁵⁰ and prohibit attorneys' solicitation for nonideological litigation or broadcast advertising for cigarettes.⁵¹

For erotic material, greater regulation and restriction (short of total prohibition) is also permissible than would be constitutional for fully protected expression, as this Court's decisions in *Mini Theatres*, *Bellanca*, *LaRue*, and *Pacifica* evince.⁵²

at 9; *Bates v. State Bar*, 433 U.S. 350, 383 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 771-72 & n.24.

49. *E.g.*, *Bolger v. Youngs Drug Products Corp.*, ____ U.S. ____, 77 L.Ed. 2d at 479; *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 496 (1982); *Bates v. State Bar*, 433 U.S. at 384; *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. at 388.

50. *E.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 772 n.24; *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 758-59 (D.C. Cir. 1977).

51. *E.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Capital Broadcasting Co. v. Mitchell*, 33 F.Supp. 582 (D.D.C. 1971), *aff'd mem. sub nom.* *Capital Broadcasting Co. v. Acting Att'y Gen'l*, 405 U.S. 1000 (1972).

52. Section I(B) *supra*. *Schad* is not contrary to this rule, because the ordinance excluded all live entertainment from commercial zones, and thereby "prohibit[ed] a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments," 452 U.S. at 65, as well as prohibiting partially protected nude dancing in adult establishments. *Doran* is also not contrary, because it found unconstitutional a total prohibition of topless dancing in establishments without liquor licenses that would have been constitutional if limited to establishments with liquor licenses. *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 716-17 (1981) (per curiam). *Vance v. Universal Amusement Co.* is not contrary, because it involved total prohibition of erotic material under a public nuisance statute without a judicial finding of obscenity. 445 U.S. 308 (1980) (per curiam). And *Erznoznik* is not contrary. Note 77 *infra*.

B. *Greater "Time, Place, and Manner" Regulations Are Permissible for Commercial Advertising and Erotic Material than for Fully Protected Expression.*

Greater regulation of the "time, place, or manner" of expression is permitted for partially protected expression⁵³ than the First Amendment permits for fully protected speech.⁵⁴

The Renton zoning ordinance is a permissible "time, place or manner" restriction. It closely resembles the ordinance in *Mini Theatres* by prohibiting adult theaters within 1,000 feet of a residential area (or school, church, or public park), just as Detroit prohibited them within 500 feet of residential areas. *Mini Theatres* found such pornography zoning to involve the permissible regulation of "nothing more than a limitation on the place where adult films may be exhibited."⁵⁵ That decision found ordinances concentrating adult theaters (as in Renton) to come within the same constitutional rationale as ordinances dispersing them.⁵⁶

53. *E.g.*, Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 240-41 (1976) (greater "degrees of time, place, and manner regulation" are permitted by "the different first amendment value of . . . commercial speech" or "sexually explicit films"); see Section II(A) *supra* (greater regulation permitted for commercial advertising than for fully protected speech).

54. *E.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

55. 427 U.S. at 71 (emphasis added). *Accord, id.* at 78-79 (Powell, J., concurring) ("ordinance is addressed only to the places at which this type of expression may be presented"); *e.g.*, *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 826 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980); *Northend Cinema, Inc. v. City of Seattle*, 90 Wash. 2d 709, 585 P.2d 1153, 1158 (1978) (en banc) ("We conclude the zoning regulation of location of adult movie theaters is a reasonable regulation of place for First Amendment speech which does not violate First Amendment freedoms."), *cert. denied*, 441 U.S. 946 (1979).

56. The opinion stated:

[W]e have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by

The Renton ordinance will not "suppress or greatly restrict access to lawful speech,"⁵⁷ in any event, any more than the Detroit ordinance permissibly did. As in *Mini Theatres*, the regulation does not "impose a limit on the total number of adult theaters which may operate," prohibit market entry by "distributors or exhibitors of adult films" or publications, or render "the viewing public . . . unable to satisfy its appetite for sexually explicit fare."⁵⁸ The appellees do not argue that they and competitors cannot find land among the 520 available acres inside Renton (which amounts to 5.4% of its total acreage); pornography shops have no constitutional right to locate in or near residential zones and schools. The "economic loss for some who are engaged in this business" because of Renton's ordinance similarly does not amount to a constitutional violation, as in *Mini Theatres*.⁵⁹ Partially protected erotic material, like commercial advertising, "may be more durable than other kinds" of speech and press because through its integral relation to "commercial profits . . . there is little likelihood of its being chilled by proper regulation and foregone entirely."⁶⁰

requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances.

427 U.S. at 62 (emphasis added). Analogous regulation of the "manner" of adult establishment commerce, through prohibiting offensive displays in their storefronts, is also constitutional. *E.g.*, *Dover News, Inc. v. City of Dover*, 117 N.H. 1066, 381 A.2d 752, 755-56 (1977); see *Borraro v. City of Louisville*, 456 F. Supp. 30, 32 (W.D. Ky. 1978); Comment, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1562-63 & n.81 (1978) ("hours" regulation of adult establishments would conform to First Amendment).

57. 427 U.S. at 71 n.35.

58. *Id.* at 62.

59. *Id.* at 78 (Powell, J., concurring).

60. *E.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 772 n.24. See also *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n*, 447 U.S. at 571 n.13.

C. Content-Based Classification and Regulation Is Permissible for Commercial Advertising and Erotic Material.

The rule for fully protected expression, that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,"⁶¹ is not absolute but "qualified."⁶² That content classification rule does not apply to partially protected speech.

For commercial advertisements, "the content of a particular advertisement may determine the extent of its protection."⁶³ "[C]ontent-based restrictions on commercial speech may be permissible," with unequal regulatory treatment of partially protected and fully protected advertising, under the First Amendment and the equal protection clause.⁶⁴ And for defamation, "the rule to be applied depend[s] on the content of the communication," as *Mini Theatres* noted.⁶⁵ In defamation law, content-based classification and disparate treatment include different regulatory standards of liability for

61. *E.g.*, *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

62. *Young v. American Mini Theatres, Inc.*, 427 U.S. at 65. *E.g.*, note 64 *infra*.

63. *Id.* at 68. Accord, *e.g.*, *Bates v. State Bar*, 433 U.S. at 363 ("If commercial speech is to be distinguished, it 'must be distinguished by its content.'").

64. *Bolger v. Youngs Drug Products Corp.*, ___ U.S. ___, 77 L.Ed.2d at 476. *E.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (banning signs advertising off-premises enterprises but not on-premises ones); *Friedman v. Rogers*, 440 U.S. 1 (1979) (prohibiting optometrists' but not others' use of trade names); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 & n.24 (1976) (prohibiting misleading and false advertisements but allowing other advertisements); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (public transit system selling placard space for commercial advertisements but not for political ones).

65. 427 U.S. at 67 (plurality opinion).

defamation of public figures and of private citizens,⁶⁶ disparate regulation of defamation involving public controversies and only private affairs,⁶⁷ and different treatment of defamation of racial or religious groups and defamation of others.⁶⁸

For erotic materials, similarly, the plurality in *Mini Theatres* "h[e]ld that the State may legitimately use the content of these [sexually explicit] materials as the basis for placing them in a different classification from other motion pictures."⁶⁹ This sort of content-based classification and regulation is supported by *Pacifica Foundation*, sustaining a FCC prohibition against nonobscene "indecent" language "based in part on its content"⁷⁰; and *LaRue*, upholding a municipal proscription of nonobscene erotic dancing or movies while permitting other dancing and movies where liquor was served.⁷¹ In fact, not classifying and discriminating between the content of erotic and non-erotic theaters and bookstores

66. Compare *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) (plurality opinion).

67. Compare *Time, Inc. v. Hill*, 424 U.S. 448, 453-55 (1976) with *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345.

68. E.g., *Beauharnais v. Illinois*, 343 U.S. 250, 263 (1952).

69. 427 U.S. at 70-71. See, e.g., *New York v. Ferber*, 458 U.S. at 766 n.18 ("Today, we hold that child pornography . . . is unprotected speech subject to content-based regulation."); *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d at 830-31.

70. *FCC v. Pacifica Foundation*, 438 U.S. at 744 (plurality opinion).

71. *California v. LaRue*, 409 U.S. 109 (1972); compare *id.* at 138 (Marshall, J., dissenting) ("[T]his classification . . . discriminates . . . on the basis of the content of their speech. Thus, California nightclub owners may present live shows and movies dealing with a wide variety of topics . . . But if they choose to deal with sex, they are treated quite differently.") (emphasis in original) with Comment, *Constitutional Law: Municipal Zoning Ordinance May Restrict Location of Adult Motion Picture Theatres*, 16 WASHBURN L.J. 479, 486 & n.52 (1977) (same); cf. *New York State Liquor Auth. v. Bellanca*, 452 U.S. at 715-18 (upholding ban on topless dancing in liquor licensed establishments).

might violate the equal protection clause, as Justice Powell noted,⁷² or the First Amendment.⁷³

D. *The Overbreadth Rule Is Inapplicable to Commercial Advertising and Erotic Material.*

The overbreadth rule⁷⁴ does not apply to partially protected expression. This Court has held that "the overbreadth doctrine does not apply to commercial speech."⁷⁵

The majority in *Mini Theatres*, in denying standing for a vagueness challenge, gave a rationale that applies equally to an overbreadth attack:

Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinance is easily susceptible of a narrowing construction, we think this is an inappropriate case in which

72. 417 U.S. at 82.

73. The prior restraint rule also might not apply to erotic material, just as for commercial advertising the "different degree of protection" "may also make inapplicable the prohibition against prior restraints." *Friedman v. Rogers*, 440 U.S. at 10, quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 772 n.24. Accord, e.g., *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n*, 447 U.S. at 571 n.13; see *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978) (upholding bar rules against partially protected attorneys' solicitation "whose objective is the prevention of harm before it occurs"); Comment, *FTC v. Simeon Maument Corp.: The First Amendment and the Need for Preliminary Injunctions of Commercial Speech*, 1977 DUKE L.J. 489, 501-10 (injunctions against commercial speech do not violate prior restraint rule). The prior restraint rule does not apply to unprotected expression such as obscenity. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

74. E.g., *Bigelow v. Virginia*, 421 U.S. 809, 816-17 (1975); *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

75. *Village of Hoffman Estates v. Flipside*, 455 U.S. at 497. Accord, e.g., *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 635 (1980); *Bates v. State Bar*, 433 U.S. at 380-81.

to adjudicate the hypothetical claims of persons not before the Court.

. . . . The fact that the First Amendment protects some, though not necessarily all, of that material from total suppression does not warrant the further conclusion that an exhibitor's doubts . . . involves the kind of threat to the free market in ideas and expression that justifies the exceptional approach [of overbreadth standing] to constitutional adjudication recognized in cases like *Dombrowski* . . .⁷⁶

The decisions in *Pacifica Foundation* and *LaRue* support this point.⁷⁷

Pornography zoning ordinances, in any event, are not overly broad on the ground that they apply to nonobscene erotic material as well as to obscene material, for two reasons. Any overbreadth is not "real and substantial"⁷⁸ in that few if any fully protected activities are affected, and none is burdened, by a location restriction for adult enterprises; and any overbroad element is readily susceptible to a limiting con-

76. 427 U.S. at 61.

77. *FCC v. Pacifica Foundation*, 438 U.S. at 743 (plurality opinion) (because such "references to excretory and sexual organs and activities" "lie at the periphery of First Amendment concern," the Court "decline[d] to administer that medicine" of "[i]nvalidating any rule on the basis of its hypothetical application to situations not before the Court"); see *California v. LaRue*, 409 U.S. 109, 118-19 & n.5 (1972) (the Supreme Court there "refused to apply the overbreadth doctrine" to regulation of sexually explicit dancing, films, and pictures in establishments with state liquor licenses).

Although *Erznoznik* found an ordinance overbroad that prohibited exhibition of films containing any nudity and visible from public streets, it involved fully protected expression that was impermissibly regulated through the ordinance's overbreadth as well as (partially protected) sexually explicit films that were as here permissibly regulated. *Id.* at 213; Note, *Using Constitutional Zoning to Neutralize Adult Entertainment—Detroit to New York*, 5 FORDHAM URB. L.J. 455, 463 (1977). It was distinguished on this basis by a majority in *Mini Theatres*. 427 U.S. at 72 n.35 (plurality opinion); *id.* at 83 (Powell, J., concurring).

78. *E.g.*, *Parker v. Levy*, 417 U.S. 733, 760 (1974); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

struction by the state courts.⁷⁹ Moreover, no overbreadth arises from such "time, place, and manner" regulations.

III. A JUSTIFICATION FOR MOST NONSUPPRESSIVE BURDENS EXISTS FOR ZONING AND OTHER REGULATION OF NONOBSCENE EROTIC MATERIAL, BECAUSE SUCH BURDENS MUST ONLY MEET THE LEGITIMATE STATE INTEREST TEST OR THE COMMERCIAL ADVERTISING TEST FOR PARTIALLY PROTECTED EXPRESSION.

For fully protected First Amendment interests, only a compelling state interest served by the least burdensome means will justify a direct burden.⁸⁰ And only an important or substantial governmental interest served by the least restrictive means will justify an incidental burden on such interests, under the *O'Brien* test.⁸¹ For partially protected First Amendment interests such as erotic material, no preferred freedom or fundamental right is involved, and a lesser state interest with a greater range of means is sufficient to justify a reasonable regulation short of a total proscription.

A. *The O'Brien Test Does Not Apply to Regulation of Commercial Advertising or Erotic Material.*

The *O'Brien* test does not apply to pornography zoning and other regulation of erotic material, because the test is designed for incidental burdens on fully protected speech intertwined with conduct rather than on partially protected expression (whether or not intertwined with conduct).⁸² That is evident in this Court's decision *not* to apply the *O'Brien* test

79. *E.g.*, *Young v. American Mini Theatres, Inc.*, 427 U.S. at 61; see *Erznoznik v. City of Jacksonville*, 422 U.S. at 216; *Broadrick v. Oklahoma* 413 U.S. at 613.

80. *E.g.*, *NAACP v. Button*, 371 U.S. 415, 438, 439 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960).

81. *E.g.*, *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Konigsberg v. State Bar*, 366 U.S. 36, 50-51 (1961).

82. 391 U.S. at 383-84. *Accord*, *e.g.*, *United States v. Orito*, 413 U.S. 139, 144 (1973).

to erotic material in *Mini Theatres*, *LaRue*, or *New York Liquor Authority v. Bellanca*.⁸³ It is also evident in the Court's election *not* to use *O'Brien* for the partially protected material in commercial advertising cases.⁸⁴ The reason is that, for partially protected expression but not for *O'Brien* expression, it is proper for the governmental interest both to be related to the regulation and restriction (although not the suppression) of partially protected speech, and to fail to use the least restrictive means (although the regulation must be narrowly drawn) to accomplish the governmental interest in regulation or restriction.

In any event, the *O'Brien* test was misapplied by the Ninth Circuit. It mischaracterized as a legislative motive test the language about a "governmental interest unrelated to the suppression of free speech," contrary to the express *O'Brien* repudiation of any assessment of legislative motive or purpose.⁸⁵ Further, the Ninth Circuit's application of *O'Brien* conflicts with that of Justice Powell in *Mini Theatres*.⁸⁷

B. *The Legitimate State Interest Test or the Commercial Advertising Test Applies to Regulation of Erotic Material.*

Regulation of partially protected commercial advertising is subject to a lower level of judicial scrutiny than regulation of fully protected speech and press,⁸⁸ so that broader regulation and restriction is possible than for fully protected expression.⁸⁹ For commercial advertising, this Court has applied both a special test, requiring a "substantial" governmental

83. See 427 U.S. at 63-73; 409 U.S. at 114; 452 U.S. at 715-18; cf. *Schad v. Borough of Mt. Ephraim*, 452 U.S. at 68-69 n.7 (mentioning but not applying *O'Brien* test).

84. Section III(B) *infra*.

86. 391 U.S. at 383-84 ("this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive").

87. 427 U.S. at 79-82. *E.g.*, *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d at 829-30.

88. *E.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 457.

89. Section II(A) *supra*.

interest and regulation "not more extensive than is necessary to serve that interest,"⁹⁰ and a legitimate state interest test⁹¹ with merely a rational relation between the regulation and that interest.⁹² Whichever is used, it does not include the requirements of the *O'Brien* test for a "governmental interest . . . unrelated to the suppression of free expression" or for the least restrictive means of achieving that interest.

Regulation of partially protected privileged defamation also appears to come under a legitimate state interest test, because "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual," in order

90. *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n*, 441 U.S. 557, 566 (1980) ("In commercial speech cases, then, a *four-part analysis* has developed. [i] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [ii] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [iii] we must determine whether the regulation directly advances the governmental interest asserted, [iv] and whether it is not more extensive than is necessary to serve that interest.") *Accord*, *Bolger v. Youngs Drug Products Corp.*, ___ U.S. ___, 77 L.Ed.2d at 478-79.

91. *E.g.*, *Friedman v. Rogers*, 440 U.S. at 10 n.9 ("legitimate regulatory interests"); *In re Primus*, 436 U.S. 412, 422 (1978); *Bigelow v. Virginia*, 421 U.S. at 826; *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. at 389; see *Members of City Council v. Taxpayers for Vincent*, ___ U.S. ___, 104 S.Ct. 2118 (1984); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 92 n.6 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 771-72 & n.24. See generally Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976).

92. *E.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 464 (permitting prophylactic measures for commercial advertising regulation); *Commonwealth v. Sterlace*, 481 Pa. 6, 14, 391 A.2d 1066, 1070 (1978) (no least restrictive means requirement for commercial advertising regulation); cf. *Moore v. City of E. Cleveland*, 431 U.S. 494, 500 (1977) (limitation on multifamily use only had "tenuous relation to alleviation of the conditions" the state interest addressed).

to implement the "legitimate state interest in compensating private individuals for wrongful injury to reputation."⁹³

Regulation of erotic material, because of its only partial protection, should also be subject to the legitimate state interest test (or minimal scrutiny), or at most to the commercial advertising test. This Court's plurality opinion in *Mini Theatres* appears to have applied a legitimate interest test to the regulation of erotic material there,⁹⁴ and appears to have found the restriction on location justified by the city's legitimate interests in "preserving the character of its neighborhoods" and "attempting to preserve the quality of urban life."⁹⁵ *Mini Theatres* appears to have required only a rational relation, rather than the *O'Brien* test's least restrictive means or the commercial advertising test's "not more exten-

93. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 347-48. *See, e.g., id.* at 345-46; *New York Times Co. v. Sullivan*, 376 U.S. at 279-80 (state interest in compensating public figures for malicious defamation); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (plurality opinion).

94. *See* 427 U.S. at 71-72; *e.g., Hart Book Stores, Inc. v. Edmisten*, 612 F.2d at 831 n.13 ("The *Mini Theatres* plurality apparently considered that classification of sexually explicit materials would invoke only minimal scrutiny, 427 U.S. at 70-73."); *County Bd. v. Richards*, 217 Va. 645, 648, 231 S.E.2d 231, 233, *vacated on other grounds*, 434 U.S. 5 (1977) (*per curiam*) (*Mini Theatres* applied legitimate interest test); Comment, *Constitutional Law—Explicit Sex and the First Amendment*, 42 Mo. L. Rev. 481, 486 (1978) (same). *See also* *New York State Liquor Auth. v. Bellanca*, 452 U.S. at 718 ("a reasonable restriction" on topless dancing in establishment with liquor license); *id.* at 717-18 (finding sufficient factual basis, if any is required, in a short legislative memorandum).

95. *See* 427 U.S. at 71-72. *E.g., Airport Book Store, Inc. v. Jackson*, 242 Ga. 214, 248 S.E.2d 623, 628 (1978) (applying "legitimate purpose" test to adult establishment regulation); Loewy, *A Better Test for Obscenity: Better for the States—Better for Libertarians*, 28 HASTINGS L.J. 1315, 1320 (1977) ("Any regulation which is reasonably related to a legitimate state objective and does not significantly impede presentation of or access to sexually explicit material is constitutional.")

sive than necessary" requirement, because it said many means would be permissible.⁹⁶

C. *That Test for Partially Protected Speech Is Met by Renton's and Other Regulations of Erotic Material.*

Legitimate governmental interests in regulation under the police power,⁹⁷ and in regulation of external costs or spillover effects,⁹⁸ justify this ordinance for pornography zoning. *Mini Theatres* characterized the Detroit ordinance as land "planning" that addressed "secondary effect[s] . . . , not the dissemination of 'offensive' speech," and as "land-use regulation" or "zoning."⁹⁹ External costs of adult establishments include possible neighborhood deterioration, property value impairment, crime proliferation, unhealthful conditions, and moral debauchery.¹⁰⁰ A rational relation exists between por-

96. "[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." 427 U.S. at 71 (plurality opinion).

97. *E.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (preservation of residential neighborhoods); *Paris Adult Theatre I v. Slaton*, 413 U.S. at 58 (protection of "the quality of life and the total community environment"); *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954) (guarding public safety and health).

98. *E.g., Kovacs v. Cooper*, 336 U.S. 77, 87-89 (1949) (plurality opinion) (regulating volume of public speech); *see California v. LaRue*, 409 U.S. at 117 n.4 (dictum) (same).

99. *Id.* at 62, 71 (plurality opinion); *id.* at 73, 74 (concurring opinion).

100. *E.g., id.* at 55 (plurality opinion) (expert testimony that concentration "adversely affects property values" and "encourages residents . . . to move elsewhere"); *id.* at 82 (concurring opinion); *Northend Cinema, Inc. v. City of Seattle*, 90 Wash.2d 709, 585 P.2d 1153, 1156 (1978) (*en banc*) ("location of adult theaters has a harmful effect on the area and contribute[s] to neighborhood blight"), *cert. denied*, 441 U.S. 945 (1979); *Airport Book Store, Inc. v. Jackson*, 242 Ga. 214, 248 S.E.2d at 226-27 ("a vice squad officer testified as to numerous arrests of [adult] bookstore customers for solicitation of sodomy, sodomy and public indecency occurring in the adult mini motion picture theaters (peep machines) located in the rear of four bookstores"); Los Angeles Dept. of City Planning, Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles 5 (City Plan Case No. 26475, City Council File No. 74-4521-S.3,

nography zoning and these legitimate governmental interests under the police power. Although the Detroit city council only heard testimony from a single expert,¹⁰¹ this Court in *Mini Theatres* did not question the sufficiency of that evidence to support the zoning ordinance or police power regulation there.¹⁰² Similarly, in *Village of Belle Terre v. Boraas*,¹⁰³ the zoning limitation on multiple family habitation in a single dwelling was found rationally related to legitimate interests in relieving urban congestion and noise and advancing family values and clean air, even though it was not the least restrictive or most effective means.¹⁰⁴

1977) ("Businessmen, residents, etc. believe that the concentration of adult establishments has adverse effects on . . . the quality of life . . . Among the adverse effects on the quality of life cited are increased crime; the effects on children; neighborhood appearance, litter and graffiti."); Comment, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1568 (1978).

101. *Nortown Theatre Inc. v. Gribbs*, 373 F.Supp. 363, 365 (E.D. Mich. 1974), *rev'd sub nom. American Mini Theatres, Inc. v. Gribbs*, 518 F.2d 1014 (6th Cir. 1975), *rev'd*, 427 U.S. 50 (1976); *e.g.*, Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 477 (1984) ("in *Young v. American Mini Theatres*, a plurality of the Court required only a 'factual basis' for the city council's conclusion that the presence of adult theaters caused neighborhood deterioration").

102. *E.g.*, *Genusa v. City of Peoria*, 619 F.2d 1203, 1211 (7th Cir. 1980) (sufficient factual basis in experience of other cities); *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d at 828-29 n.9 (sufficient basis in one inspector's visit at five establishments); *cf.* *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973) ("From the beginning of civilized societies, legislators . . . have acted on various unprovable assumptions," and "[n]othing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data."); *Kaplan v. California*, 413 U.S. 115, 120 (1973) (same).

103. 416 U.S. 1 (1974).

104. *Id.* at 8. "[W]e cannot say that legislative action is rendered irrational by its choice of a less efficacious and less powerful approach than the Constitution might permit." *Hart Book Stores v. Edmisten*, 612 F.2d at 830.

CONCLUSION

This Court should hold emphatically that pornography zoning and extensive regulation of adult establishments is constitutional. Only partial protection of the First Amendment extends to nonobscene erotic material. No impermissible burden on such erotic material results from most restrictive regulation that would impermissibly burden fully protected speech. A sufficient justification for most regulatory burdens is present under the legitimate state interest test or the commercial advertising test, in contrast to the *O'Brien* test or the compelling interest test. These points are also true of commercial advertising, which also is only partially protected.

The "First Amendment . . . was not intended to be the death-knell of cities" or to condemn governmental efforts "to prevent its neighborhoods from becoming sex-oriented, crime-ridden wastelands."¹⁰⁵ For the reasons discussed in this brief, the decision of the Ninth Circuit should be reversed.

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105. *American Mini Theatres, Inc. v. Gribbs*, 518 F.2d at 1025 (dissenting opinion), *rev'd*, 427 U.S. 50 (1976).

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JOSEPH F. SPANIOL, JR.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE CITY OF RENTON, *et al.*,
Appellants,

v.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

**BRIEF OF THE OUTDOOR ADVERTISING
ASSOCIATION OF AMERICA, INC. AND THE
AMERICAN ADVERTISING FEDERATION
AS AMICI CURIAE IN SUPPORT OF
APPELLEES**

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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1984

No. 84-1360

THE CITY OF RENTON, *et al.*,
Appellants,

v.

PLAYTIME THEATRES, INC.,
 a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals
 for the Ninth Circuit

BRIEF OF THE OUTDOOR ADVERTISING
 ASSOCIATION OF AMERICA, INC. AND THE
 AMERICAN ADVERTISING FEDERATION
 AS AMICI CURIAE IN SUPPORT OF
 APPELLEES

INTEREST OF AMICI CURIAE

This brief is submitted jointly by the Outdoor Advertising Association of America, Inc. (OAAA) and the American Advertising Federation (AAF) as amici curiae. Amici have secured the consent of each party

to the filing of this brief. Amici support the position of appellees in this case and urge affirmance of the decision below.

The OAAA is the trade association of the standardized outdoor advertising industry in the United States. Outdoor advertisers maintain off-premise posters and painted bulletins which disseminate commercial and non-commercial messages that do not pertain to activities conducted on the premises on which the outdoor advertising signs are located. The OAAA's membership is composed of one hundred sixty-nine companies which serve 7,900 distinct local areas throughout the United States.

The American Advertising Federation is a national trade association which includes within its membership representatives of all of the various elements of the advertising industry. The membership of the Federation includes companies which manufacture and sell consumer products, advertising agencies, outdoor advertising companies, newspaper and magazine publishers, radio and television broadcasters and networks and approximately 22 other trade associations with memberships composed of companies engaged in various advertising pursuits. The Federation is also the parent body of more than 200 local advertising clubs and federations located throughout the United States which have a combined membership of approximately 36,000 advertising practitioners.

Amici have a direct interest in this case because it presents fundamental questions regarding judicial review of an ordinance that impinges on speech protected by the First Amendment. Many different media disseminating commercial and non-commercial mes-

sages, including newspapers, TV and radio broadcast facilities and off-premise signage, are subject to government zoning regulations. As a result, this Court's decision in this case may have an impact upon Amici's membership insofar as it may treat the regulation of speech through zoning restrictions.

SUMMARY OF ARGUMENT

This case is positioned at the friction point of two potentially conflicting lines of precedent. In general, state and local governments have been accorded broad latitude in decisions regarding land use. *Berman v. Parker*, 348 U.S. 26 (1954). Nevertheless, this Court has tightly reined in the exercise of that authority and refused simply to defer to local discretion where land use issues transcend purely police power concerns and impact on First Amendment freedoms. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981). In such circumstances, the Court has sought to strike a realistic balance through a carefully constructed analytic framework that permits content neutral restrictions governing the time, place and manner of protected expression. Such restrictions are constitutional where they are found to serve a concrete and substantial governmental interest that is unrelated to the suppression of speech and where they result in only an incidental impact on protected speech that is no greater than is essential to the furtherance of the governmental interest that is involved. *United States v. O'Brien*, 391 U.S. 367 (1968).

The *O'Brien* test gives specific guidance to law makers on what is necessary to promulgate constitutional time, place, and manner restrictions. In a sense, the

viability of the *O'Brien* test depends upon the integrity of the local legislative process itself in each separate community across the United States. But, in the final analysis, the degree to which protected speech remains free from governmental encroachment through land use restrictions depends upon meaningful judicial review.

It is inevitable that local legislative decisions tend to reflect immediate pressures exerted from within the community. The intensity of these pressures is evident in the record in the instant case. Thus, the statement of reasons for enactment set forth in the Renton ordinance gives vent to the community's apprehensions that the presence of adult theaters would destroy the town by threatening the commercial and retail bases of the city and causing residents to move away. *Playtime Theatres, Inc. v. Renton, et al.*, 748 F.2d 527, 530-31, n.3 (9th Cir. 1984). The pressure that mounted on Renton officials in these circumstances to give First Amendment concerns short shrift is palpable in these statements.

At any given point in time, a community may believe that its quality of life, appearance or property values are threatened by all manner of First Amendment-related activities, such as street corner newsboxes, broadcast transmissions towers, picketers, commercial and non-commercial signage, sound trucks, leafletting or adult theaters. When this occurs, it cannot be presumed that the locality will strike a constitutional balance when it legislates. The cauldron of the local legislative process therefore makes it imperative that the procedural safeguards for meaningful and thorough judicial review are not compromised.

The City of Renton urges this Court to reject the careful scrutiny which the Ninth Circuit applied to the instant ordinance. The effect of this would be to broaden the discretion accorded to local legislative decisions which impinge upon speech protected by the First Amendment and to undercut the high degree of judicial vigilance that is mandated in these circumstances. The resulting expansion of deference to law makers would reduce the constitutional safeguards of judicial review to a meaningless ritual, with the Courts superficially reviewing enactments which rely upon a mechanistic recitation of "constitutionally correct" findings for their validity.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS APPLIED PROPER STANDARDS IN SCRUTINIZING THE RENTON ORDINANCE

In the instant case, the Ninth Circuit applied correct constitutional standards when it reviewed the Renton zoning ordinance after properly conducting an independent *de novo* review of the record evidence and assigning to the City of Renton the burden of justifying its ordinance.

A. The Appellate Court Properly Conducted An Independent Review Of The Record To Determine Whether The Renton Ordinance Was Constitutional

The general rule of statutory review is that a law is presumed to be valid and will be sustained if it is rationally related to a legitimate government interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1980). The Constitution generally presumes that even improvident decisions will eventually be rectified by the democratic

processes. *Cleburne v. Cleburne Living Center*, 473 U.S. — (1985). But under the decisions of this Court, that general rule gives way quickly where a law impinges on fundamental First Amendment rights. In those circumstances, the law is subjected to strict and independent scrutiny by the Courts. See, e.g., *Schad v. Mount Ephraim*, *supra* at 452 U.S. 77; *Police Department of Chicago v. Mosley*, 408 U.S. 91, 98-99 (1972); *Cleburne v. Cleburne Living Center*, *supra*. Under these circumstances, this Court has made it clear beyond peradventure that the duty of an appellate court is to conduct a *de novo* review of the record and not simply to defer to the findings of the trial court. *Feiner v. New York*, 340 U.S. 315, 316 (1951). See, also, *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971). As recently as last year, this Court reaffirmed this principle, ruling in a defamation case that Federal Rule of Civil Procedure 52(a)¹ does not prevent federal appellate judges from conducting a *de novo* review of the evidence in the record. *Bose v. Consumers Union*, 466 U.S. — (1984).

The Ninth Circuit correctly held in the instant case that it had an “obligation to scrutinize strictly the zoning decisions that infringe on first amendment rights” through *de novo* review of the facts to determine whether the Renton ordinance satisfied the criteria for a valid “time, place and manner” restriction on protected speech. *Playtime Theatres, Inc. v. The*

¹ Federal Rule of Civil Procedure 52(a) states: “Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.”

City of Renton, et al., *supra* at 748 F.2d 534. *United States v. O'Brien*, *supra*.

After conducting that *de novo* review of the record, the Court of Appeals independently determined that, despite the superficial attractiveness of Renton’s legislative scheme, the land ostensibly set aside by Renton for adult theaters was, in fact, largely occupied and not actually available. Under these circumstances, the Court of Appeals found that the Renton ordinance did not provide a viable remedy, since it seriously limited the number of sites for adult theaters. Therefore, unlike the Detroit ordinance in *Young v. American Mini Theaters*, 427 U.S. 50 (1976), the Renton ordinance constituted a substantial restriction on protected speech. As a result, the Court concluded that the Renton land use restriction had more than an incidental impact on protected speech and could not be sustained under the authority of *Young*, *supra*.

Appellants argue that the Circuit Court was wrong in concluding that much of the land in the set aside area was unavailable for use by adult theaters. According to Appellants, the test for “availability” of land should be whether, in theory, adult theaters can locate in the set aside area in “the normal course of business.” Adoption of that position would undercut the principle of *de novo* review because it would preclude a reviewing court from looking beyond the surface reasonableness of a regulatory scheme to determine if there was any substance to the plan, based upon the record created by its proponents.

B. Renton Failed To Carry Its Burden Of Articulating And Supporting The Basis For Its Zoning Regulation

1. Renton Failed To Demonstrate That Its Ordinance Furthered A Substantial Government Interest

In its review of whether the Renton ordinance met the *O'Brien* test, the Court of Appeals found that it was confronted with nothing more than the City's litany of conclusory findings of fact or "reasons" and an otherwise "very thin" record devoid of any substantiation, other than a recitation of the experiences in other communities such as Detroit or Seattle, which had markedly different characteristics from Renton. Given these circumstances, the Circuit Court held that the City had failed to sustain its affirmative burden of proof to demonstrate that its restriction on a protected means of expression passed the *O'Brien* test in the specific context of Renton's circumstances.

This Court has stated: "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Schneider v. State*, 308 U.S. 147 (1939); *Schad v. City of Ephraim*, 452 U.S. 52, 71 (1981). But Renton relied on exactly such preferences and beliefs to justify its ordinance here. When called upon by the Circuit Court to explain the basis for its law the City failed to justify its ordinance and the remedies it imposed in the context of its own circumstances. Rather, it relied on prior decisions involving Seattle and Detroit. These decisions are precedent for the proposition that adult theaters may be subject to constitutional time, place and manner constraints

under *O'Brien*. However, the existence of that precedent alone is insufficient to substantiate that Renton's approach was a sufficiently "incidental" restriction which was no greater than necessary to further a valid government interest.

"[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight when the zoning regulation trenches on the First Amendment. In order for a reviewing court to determine whether a zoning restriction that imposes on free speech is 'narrowly drawn [to] further a sufficiently substantial government interest . . . ' the zoning authority must be prepared to articulate, and support, a reasoned and significant basis for its decision. This burden is by no means insurmountable, but neither should it be viewed as *de minimis*."

Schad, supra at 77 (concurring opinion).

Confronted with a record in the Renton case which was devoid of any articulated and reasoned basis for the particular ordinance that was devised, the Circuit Court was compelled to find that Renton had failed to sustain its burden. In essence, the reviewing court required more of a justification than a series of self-serving legislative findings based, in part, on the experiences of other cities which may or may not have been relevant to the circumstances in Renton. A contrary decision would have relieved the government of its burden of proof and would have resulted in a decision which paid broad deference to unsubstantiated and conclusory findings born out of the heat of the local legislative process.

2. Renton Failed To Demonstrate That Its Ordinance Was Unrelated To The Suppression Of Speech

An important aspect of Appellants' brief is the emphasis that it places on the Circuit Court's references to "motive" during its review of whether the Renton ordinance was unrelated to the content of the speech being restricted. The issue here is not the use of a particular word by the Ninth Circuit as the Appellants' appear to contend. Rather, it is whether the Ninth Circuit's constitutional analysis consisted of anything more than a straight-forward review of the governmental interests stated in the preamble of the ordinance. In *O'Brien, supra*, this Court rejected a very different type of inquiry into legislative "motive":

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

United States v. O'Brien, supra at 391 U.S. 383-84.

There is nothing in the Circuit Court's decision which provides a basis for concluding that, in referring to "motive", the court was attempting to look behind the face of statement of reasons which was enacted as part of the Renton ordinance. Rather, in ascribing "motive", the Circuit Court of Appeals went no further in its analysis than the statement of reasons appearing on the face of the ordinance. In doing so, the Circuit Court made a factual finding that "many of the stated reasons for the ordinance were no more than expressions of dislike for the subject matter." *Playtime Theatres v. Renton, supra* at 478 F.2d 537. As a result the Ninth Circuit concluded that Renton had failed to sustain its burden of demonstrating that the governmental interests advanced by the ordinance were unrelated to the suppression of protected speech. Clearly, the type of search for "motive" condemned in *O'Brien, supra*, did not occur in this case.

CONCLUSION

A locality is not prevented from regulating the non-speech aspects of adult theaters simply because that regulation is subject to careful *de novo* scrutiny by the Courts. Nor is that community hamstrung in seeking to protect itself from those impacts simply because it must carry the burden of demonstrating that its regulation is constitutional under the test set forth in *United States v. O'Brien, supra*.

There would be little remaining of the requirement that government must sustain the burden of demonstrating the constitutionality of an ordinance under the *O'Brien* test if a locality were simply permitted to rely on facts presented by other localities in prior

cases to justify the unique remedy it has selected in its own circumstances. Reliance by a municipality on the fact that another community's ordinance was upheld by the courts, without more, is not adequate substantiation that the municipality's actions are unrelated to the suppression of protected speech, or that the particular remedy it has selected to deal with a perceived problem only has an incidental impact on expression that is in fact no greater than necessary to serve a substantial governmental interest.

Nevertheless, Appellants urge the Court to accept these premises. The result would be to diminish severely the well established safeguards which enable the courts to effectively review local land use regulations that impinge on protected speech.

Respectfully submitted,

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BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION,
INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC.,
COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIA-
TIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS
ASSOCIATION, INC., NATIONAL ASSOCIATION OF
COLLEGE STORES, INC., AND THE FREEDOM TO READ
FOUNDATION, AS *AMICI CURIAE*, IN SUPPORT OF
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STATEMENT

The American Booksellers Association, Inc.; the Association of American Publishers, Inc.; the Council for Periodical Distributors Associations; the International Periodical Distributors Association, Inc.; the National Association of College Stores, Inc.; and The Freedom to Read Foundation (collectively referred to as "*amici*") submit this joint brief *amici curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of Appellees. This joint brief is submitted upon the written consent of both Appellants and Appellees¹.

The Amici

The *amici*'s members publish, produce, distribute, sell and lend books, magazines, and other printed materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is the major national association of booksellers in the United States. ABA has approximately 5,200 members consisting of private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately three hundred and twenty-five members include most of the major commercial book pub-

¹ The original of Appellants' written consent by E. Barrett Prettyman, Jr. and the original of Appellees' written consent by Jack R. Burns are filed herewith.

lishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of all general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, universities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities.

The Council for Periodical Distributors Associations is the national trade association for over five hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,300 college stores located throughout the United States.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the rights of libraries to in-

clude in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

Interest of the Amici

The *amici*, as participants in different aspects of making reading material of all kinds available to the general public, have a continuing interest in the decisions of this Court involving the balancing of First Amendment rights, and restrictions on materials with sexual content. The *amici*'s brief will indicate the impact of the legal principles involved upon those who produce, distribute, sell, exhibit and lend material which is not obscene. The *amici* have learned from experience that, in an eagerness to attack the social harms perceived to stem from the prevalence and accessibility of certain sexually-related materials, state and city legislators and enforcement agencies frequently treat legitimate constitutionally-protected books and periodicals no differently from those materials which are obscene and not protected. Unless the constitutionally mandated distinction is maintained, First Amendment rights will be threatened and curtailed.

While the facts underlying the holding in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) relate only to permissible zoning restrictions on adult theatres, the discussion of location restriction in *American Mini Theatres* is cited most frequently in cases not involving or limited to adult theatres but rather involving other materials and communications protected by the First Amendment. See, e.g., *North Street Book Shoppe, Inc. v. Village*

of *Endicott*, 582 F.Supp. 1428, 1432-35 (N.D.N.Y. 1984) (zoning restrictions on adult entertainment businesses including bookstores).

Although the facts of the case *sub judice* implicate only adult theatres directly, this Court's decision can be expected to have a far-reaching impact on the accessibility of books, periodicals and other First Amendment protected materials. In effect, therefore, this case raises the issue of what time, manner and place restrictions may be imposed upon any First Amendment protected materials.

I.

THE CONTENT-BASED RENTON ORDINANCE UNCONSTITUTIONALLY RESTRICTS PUBLIC ACCESS TO NON-OBSCENE, FIRST AMENDMENT PROTECTED EXPRESSION.

The basic principle at issue in this case is whether non-obscene, First Amendment protected materials may effectively be banned from all normal and customary avenues of distribution to the public. The Renton ordinance is a time, place and manner restriction based on the content of certain non-obscene, First Amendment protected expression and therefore the ordinance runs afoul of this Court's First Amendment teachings. *See infra*, at 6. If such a ban were to be approved as to adult theatres, local officials could use this decision as precedent for similarly banning other First Amendment protected, sexually related materials that are found distasteful by some in the community. The City of Renton attempts to justify its ordinance with *post hoc* findings that even a single adult theatre located in the cus-

tomary commercial districts of Renton would cause a "blight" upon the city. Generalized, hypothetical arguments regarding neighborhood "blight" are so amorphous that they cannot justify the banning of non-obscene expression from mainstream society. Indeed, *amici's* experience has proved that there are law enforcement officers who consider the public sale of non-obscene erotic publications to itself constitute a blight on the community.

In their attempt constitutionally to justify the Renton ordinance, Appellants rely on the fact that this Court upheld the Detroit ordinance at issue in *Young v. American Mini Theatres*, 427 U.S. 50 (1976). That reliance is misplaced and this Court should take this opportunity to correct that misapprehension. Appellants rely on language found in the minority plurality opinion of four of the nine justices which was rejected by Justice Powell in his concurrence, 427 U.S. at 73 n.1, and by the four dissenters, 427 U.S. at 84. The determining vote was cast by Justice Powell in an opinion which stated that "non-obscene, erotic materials may [not] be treated differently under First Amendment principles from other forms of protected expression". 427 U.S. at 73 n.1. Further, Justice Powell found the appropriate test to be:

- (i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them? On the record in this case, these inquiries must be answered in the negative. At most the impact of the ordinance on these interests is incidental and minimal.

427 U.S. at 78.

Justice Powell's view of the limited permissibility of such time, place and manner restrictions has been justified by the experience since the decision in 1976. Many jurisdictions, such as the City of Renton, viewed *American Mini Theatres* as authorization to enact zoning ordinances imposing significant obstructions to free access to First Amendment protected materials. As Appellants have conceded, the courts have overwhelmingly rejected such an approach. See Jurisdictional Statement, at 11-13.

The subsequent opinions of this Court also have recognized that time, place and manner restrictions are valid only if "they are justified without reference to the content of the regulated speech, . . . they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-violence*, 104 S.Ct. 3065, 3069 (1984). See also: *Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 535-36 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council*, 425 U.S. 748, 771 (1976) (time, place and manner restrictions are permissible only when the restrictions are content-neutral).

The use of *American Mini Theatres* by legislators demonstrates one of the dangers inherent whenever this Court creates a crack, however narrow, in the wall of First Amendment protection. Line-drawing is always hazardous, and legislators and jurisdictions facing political and constituency pressures are not always as sensitive to First Amendment concerns as they should be. Repeatedly, cities

have passed ordinances which have the practical effect of either totally banning the regulated First Amendment protected uses, e.g., *Alexander v. City of Minneapolis*, 698 F.2d 936, 939 (8th Cir. 1983); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 96 (6th Cir. 1981), or achieving the same goal by relegating such protected uses to limited commercially inferior or unacceptable locations², e.g., *Basiar-danes v. City of Galveston*, 682 F.2d 1203, 1209 (5th Cir. 1982) (limited to "swamps, warehouses and railroad tracks" lacking "access roads and retail establishments").

The Renton ordinance is explicitly content specific. The target of the ordinance is any theatre presenting "any . . . visual media, distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' as hereafter defined, for observation by patrons therein." *Play-time Theatres, Inc. v. City of Renton*, 748 F.2d 527, 529 n.1 (9th Cir. 1984). The speech that would be muted, and in effect likely silenced, by a ruling upholding such content-based regulation is fully protected under the First Amendment. The amici publish and distribute non-obscene First Amendment protected materials, including books and periodicals with sexual content that address philosophical, social, artistic and literary matters of public concern. The continued availability of such materials through customary avenues of trade would be critically endangered by any ruling endorsing the City of Renton's sweeping ban on expression. In the booksellers' trade, public accessibility is key.

² These ordinances are not infrequently passed in haste without adequate findings in order to block a specific planned retail establishment. E.g., *754 Orange Ave., Inc. v. City of West Haven*, 761 F.2d 105, 112 & n.6 (2d Cir. 1985); *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659, 661-62 (8th Cir. 1981).

Exposure to materials, especially new works, comes about primarily as a result of the reader viewing and perusing the material prior to purchase; in fact, the vast bulk of all sales can be attributed to impulse buying. The free exercise of precious First Amendment rights cannot be preserved in the absence of full access to communicative materials. A ruling authorizing First Amendment protected materials to be banned from all customary avenues of trade, therefore, would deal nearly as deadly a blow to First Amendment rights as would a direct ban of such materials in their entirety.

Appellants' assumption that, in effect, it makes no difference for First Amendment purposes where in a jurisdiction First Amendment protected material is permitted to be distributed so long as it is available somewhere, totally ignores the practical impact of marketing. The pervasive psychological impact of relegating certain First Amendment protected speech—segregated by content—to a “black market” on the outskirts of town would ensure the atrophy of that expression. As this Court stated in *Schad v. Mount Ephraim*, 452 U.S. 61, 76-77 (1981): “One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Amici* do not argue that material with sexual content should have a privileged status, but rather, as contemplated by the First Amendment, it have an equal platform in the marketplace of ideas.

Time, place and manner regulations that burden expression “must be evaluated in terms of their general effect.” *United States v. Albertini*, 53 U.S.L.W. 4844, 4848

(U.S. 1985). The general effect of the Renton ordinance is to run non-obscene First Amendment protected speech out of town.

II.

SET-ASIDE STATUTES EFFECT A FAR MORE SIGNIFICANT FIRST AMENDMENT RESTRICTION THAN DO DISPERSAL STATUTES.

Dispersal statutes³ and set-aside statutes⁴ do not have similar effects on the accessibility of First Amendment protected expression, and therefore such statutes are not interchangeable for the purposes of constitutional analysis. Appellants concede that the Renton ordinance is a set-aside statute restricting the showing of certain non-obscene motion pictures to one part of the city distant from the general commercial district. By effectively banning all normal and customary access to this First Amendment protected expression, the Renton ordinance has a drastically more restrictive effect on public access than would a dispersal statute aimed at preventing the concentration of adult uses. The blunderbuss restrictions on First Amendment protected communication contained in the Renton ordinance do not even attempt narrowly to address the general welfare concerns purportedly constituting the justification for the ordinance. The City of Renton attempts to make the truly

³ Dispersal, or anti-concentration, statutes—such as the Detroit ordinance reviewed in *American Mini Theatres*—require that adult uses be separated some distance from each other.

⁴ Set-aside statutes—such as the Renton ordinance—restrict the sale of First Amendment protected materials from all but a specified portion of a community. No set-aside statute has passed constitutional muster in the federal Courts of Appeals. *See infra*, at 10-11.

extraordinary argument that the presence of a single adult theatre in the central commercial districts of Renton would cause such dire effects that the City is justified in banishing such speech from all normal and customary avenues of trade. By concentrating all adult theatres in a single area, the City of Renton will promote many of the adverse effects that it purportedly is attempting to avoid.

As acknowledged by the Appellants, every federal Court of Appeals to reach the merits of a challenge to a set-aside ordinance has stricken the statute as violative of the First Amendment.⁵ For example, in *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982), the Fifth Circuit held unconstitutional an ordinance that banned adult theatres throughout the city except in "industrial zones at a great distance from other consumer-oriented establishments." 682 F.2d at 1214. As in the case *sub judice*, the Fifth Circuit in *Basiardanes* could find no evidence to support "the City Council's assumption that one adult theater located downtown and urban blight are linked." 682 F.2d at 1215-16. In *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1981), the Eighth Circuit struck down a zoning ordinance that prohibited the exhibition or sale of sexually related films within one hundred yards of residential districts, churches, schools and public parks. 667 F.2d 659 at

⁵ See Jurisdictional Statement, at 11-13. *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), is cited by Appellants as upholding the validity of a *Young*-style adult theatre ordinance. In fact, the Seventh Circuit dismissed the challenge to the zoning provisions requiring adult businesses be separated from residential districts, schools and places of worship on the ground that the plaintiff bookstore owners lacked standing because of a grandfather clause in the ordinance, and only upheld that portion of the ordinance relating to the separation of adult businesses from each other. 619 F.2d at 1210-12.

660 n.3. The Eighth Circuit held the ordinance to be an impermissible time, place and manner restriction since the ordinance "is clearly a content-based regulation of protected speech." 667 F.2d at 663.

The Appellants conceded that the First, Fifth, Sixth, Eighth and Ninth Circuits have stricken regulations of non-obscene First Amendment protected materials like the Renton ordinance. These holdings comport with the rulings of this Court that time, place and manner restrictions may not be content-based. The Renton ordinance similarly must be stricken as violative of the First Amendment.

In evaluating time, place and manner restrictions on First Amendment protected expression, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Schad v. Mount Ephraim*, 452 U.S. 61, 75 (1981), quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972). *American Mini Theatres* acknowledges that it is within the proper zoning authority of a municipality generally to restrict the location of commercial establishments to specified commercial zones. 427 U.S. at 62. *American Mini Theatres* also held that the location of adult theatres within such zones could be further restricted so as to disperse such uses throughout a municipality's commercial zones. *Id.* *American Mini Theatres* does not authorize, and the First Amendment does not permit, the wholesale banning of First Amendment protected expression from all normal and customary avenues of trade in municipalities such as the City of Renton.

In support of their ban on non-obscene expression, Appellants cite various materials that in fact undermine

Appellants' position by underscoring the distinction between dispersal and set-aside statutes. Appellants, for example, rely upon *Zoning Obscenity: Or, the Moral Politics of Porn*, by Norman Marcus, 27 Buffalo L.Rev. 1 (1977).⁶ The Marcus study analyzed New York City's attempt to enact an anti-concentration or dispersal adult use ordinance similar to the Detroit ordinance under review in *American Mini Theatres*. The New York City study contrasted the crime rates in districts with concentrated adult uses (e.g., Times Square) and districts with a modest number of such uses. Correlating increased crime rates with the concentration of adult uses, New York City sought to disperse adult uses throughout the customary commercial districts. The Marcus study highlights the deleterious effects of concentrating adult uses and thus runs counter to the Renton set-aside ordinance.

The experiences of other cities, like Detroit and New York, in regard to dispersal statutes, can provide no support to Renton's effort to ban non-obscene, First Amendment protected materials from all normal and customary public access.

It is conceded by the Appellants that no federal Court of Appeals has upheld a set-aside ordinance. The holdings of the First, Fifth, Sixth, Eighth and Ninth Circuits are not erroneous. Unless the First Amendment principals underlying these holdings are affirmed, First Amendment rights will be subject to emasculation by those who would dictate which expression is to be promoted and which expression is to be relegated to atrophy in a "black market".

⁶ See Brief for Appellants, at 26 and 29.

CONCLUSION

For the reasons set forth above, we respectfully urge this Court to strike the Renton ordinance as an unconstitutional, content-based regulation of First Amendment protected expression, and to affirm the order of the United States Court of Appeals for the Ninth Circuit.

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Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

THE CITY OF RENTON, *et al.*,

Appellants,

—vs.—

PLAYTIME THEATRES, INC.,
A Washington Corporation, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES
UNION AND THE AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON AS *AMICI CURIAE*
IN SUPPORT OF APPELLEES**

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INTEREST OF AMICI*

The American Civil Liberties Union Foundation is a non-partisan organization of over 200,000 members, dedicated to defending the fundamental liberties guaranteed in the Bill of Rights. The ACLU of Washington is one of its state affiliates, with more than 6,000 members. The ACLU and its affiliates are devoted to defending freedom of expression under the First Amendment. They actively oppose laws and other official actions which limit the flow of information and the freedom of self-expression which the First Amendment guarantees.

The ACLU opposes all restrictions on the availability of books, films and

* Counsel for all parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

other media based on their content. To the extent the courts permit any such restrictions, the ACLU opposes all efforts to expand the scope of permissible regulation. The argument in this brief is not based on the ACLU's opposition to all content-based restrictions on speech, but on currently recognized legal principles.

SUMMARY OF ARGUMENT

In Young v. American Mini Theatres, Inc., 427 U.S. 50, reh'g denied, 429 U.S. 873 (1976), this Court upheld the Detroit "Anti-Skid Row" Ordinance, which restricted the location of adult theatres and bookstores, as well as other businesses, holding that the Ordinance did not substantially restrict protected expression and was enacted to preserve the character of the City's neighborhoods. In this case, the record

demonstrates that Renton's ordinance has a much more severe effect on First Amendment rights. Because the area in which adult theatres are permitted to locate is either unavailable or obviously unsuitable for commercial uses, the effect of the ordinance is to ban such theatres from the City. The City's stated reasons for the ordinance are a mere pretext to cloak its obvious purpose, which is to stifle a form of protected expression.

Because its effects are much more severe than those of the Detroit Ordinance, the Renton Ordinance should be subjected to closer judicial scrutiny than the Court employed in Young. The four-part test developed in United States v. O'Brien, 391 U.S. 367, reh'g denied, 393 U.S. 900 (1968), should be used only when a government regulation of "nonspeech" elements of conduct

creates incidental limitations on First Amendment rights. Where a content-based regulation substantially limits free speech, it should only be upheld if it is narrowly drawn to serve a compelling governmental interest. The Renton Ordinance cannot withstand such close scrutiny.

Even under the more relaxed O'Brien standard of review, Renton must show the Ordinance furthers an important or substantial interest which is unrelated to the suppression of free expression, and does not unduly restrict First Amendment freedoms to serve that interest. The effect of the Renton Ordinance is not only to place adult theatres at a distance from residential neighborhoods, schools and churches, but also to remove them from the City's central business district and all existing commercial areas. The City cannot articulate any

substantial and legitimate interest which requires that adult theatres be separated from all non-industrial commercial uses.

The City relies on "evidence" from other cities allegedly showing that adult theatres cause deleterious effects. That evidence was employed to support zoning provisions which require the dispersal or concentration of adult entertainment uses, but Renton's ordinance has an entirely different effect. There is no empirical evidence of adverse effects resulting from the proximity of adult theatres to schools, churches, residential neighborhoods or shopping districts.

While Renton claims to have set aside an adequate and appropriate area for adult theatres, the record shows that area is neither adequate nor appropriate. The effect of the ordinance,

together with the history of its enactment, demonstrate that the City has exploited the tools of zoning law to accomplish an improper purpose. If the Court pierces the form of the ordinance to examine its substance, the improper motive and the drastic effects are clear.

The Magistrate and the District Judge reached entirely opposite conclusions regarding the purpose and effect of the Renton Ordinance, based on the same evidence. Because the interpretation of the evidence affects the determination of important First Amendment issues, this Court should conduct an independent review of the record to determine whether constitutional standards are met.

ARGUMENT

I. THE RENTON ORDINANCE SHOULD BE SUBJECTED TO STRICT JUDICIAL SCRUTINY.

A. An Ordinance That Substantially Limits Protected Speech Must Be Narrowly Drawn To Serve A Substantial Governmental Interest.

When a zoning ordinance is challenged, "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981). "[A]s is true of other ordinances, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial governmental interest." Id. (footnote omitted).

The rule applied to zoning ordinances in Schad is consistent with the

Court's standard of review in other First Amendment cases. Statutes which regulate expression according to its content are generally subjected to strict scrutiny, and are held to violate the First Amendment and the equal protection clause of the Fourteenth Amendment unless they are narrowly tailored to serve a compelling governmental interest. Carey v. Brown, 447 U.S. 455, 461-65 (1980); Police Department of Chicago v. Mosley, 408 U.S. 92, 94-99 (1972).

In United States v. O'Brien, *supra*, the Court developed a less stringent test for statutes involving only "incidental limitations on First Amendment freedoms." 391 U.S. at 376. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the

nonspeech element can justify" such incidental effects. Id. The test provides that

a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377 (emphasis supplied).

In his concurring opinion in Young v. American Mini Theatres, *supra*, Justice Powell applied the O'Brien test because he explicitly found the Detroit "Anti-Skid Row" Ordinance served interests other than the suppression of speech and had only an "incidental impact upon First Amendment interests." 427 U.S. at 74-75, 79-80; see id. at 62, 71 n.35 (plurality opinion); Schad,

supra, 452 U.S. at 71. Similarly, the Court applied the test in reviewing an ordinance which prohibited posting signs on public property in Members of the City Council v. Taxpayers For Vincent, ____ U.S. ____, 80 L.Ed.2d 772 (1984), because there was "no claim that the ordinance was designed to suppress certain ideas that the City [found] distasteful" 80 L.Ed.2d at 786.

Here, Appellants urge the Court to apply the O'Brien test in order to avoid any searching inquiry into legislative motives. See Brief For Appellants, at 17, 36-38. Yet some inquiry into the purpose of the ordinance is necessary to determine whether the O'Brien test applies, because it applies only when the government regulates "nonspeech" elements of the conduct at issue. Legislative purpose is not irrelevant in

constitutional adjudication. Washington v. Davis, 426 U.S. 229, 244 n.11 (1976). The applicable standard of review should depend on whether it appears the government's purpose was to regulate expression or its "communicative impact."¹

When a zoning ordinance has a substantial impact on protected forms of expression, the correct standard of

1 Even a "facially neutral" government action "should . . . [be] subject to . . . more demanding scrutiny . . . [if it is] intended . . . to control or penalize the exercise of rights of expression or association." L. Tribe, American Constitutional Law, § 12-5 at 591 (1978) (footnote omitted). Professor Tribe explains that strict judicial scrutiny applies when government actions are aimed at the "communicative impact" of speech, and a less stringent balancing of interests occurs when they are aimed at "noncommunicative impacts." Id., § 12-2. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502 (1981) (plurality opinion).

review is set forth in Schad, Carey v. Brown and Police Department v. Mosley, supra: it should not be upheld unless its provisions are essential to serve a compelling governmental interest, and are narrowly tailored to serve that purpose.² The Renton Ordinance cannot satisfy that test.

B. The Renton Ordinance Has A Substantial Impact On Freedom Of Expression.

2 The Renton Ordinance should not be measured by the standards applied to time, place and manner restrictions. The Court has held that a permissible restriction on the time, place or manner of expression "may not be based upon either the content or subject matter of speech." Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 536 (1980); see Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 516-17 (1981) (plurality opinion). In addition, reasonable time, place and manner restrictions "must leave open adequate alternative channels of communication." Schad, supra, 452 U.S. at 75-76.

The Renton Ordinance restricts adult theatres to an area comprising about five percent of the City, which is remote from the downtown business district and other commercial areas. The unrestricted area is, with few exceptions, unavailable for sale or lease. (JA 217-24) It is largely undeveloped, has little or no vehicle or pedestrian traffic in the evening, and is poorly lit. (JA 30, 231, 241) A substantial portion is covered by railroad tracks and spurs; other portions include an industrial park, the overflow parking area for a horse-racing track, an oil tank farm, a sewage disposal site and treatment plant, and a manufacturing facility. (JA 57, 59-60, 63-64, 68-70, 88, 231, 241) Thus the U.S. Magistrate concluded, "The area is largely undeveloped and what development there is is entirely unsuitable for retail purposes

in general and for theatre purposes in particular." (App. 41a)

In Young, both the plurality and concurring opinions relied on the conclusion that the Detroit Ordinance did not substantially restrict market access for adult bookstores and theatres. Justice Stevens wrote, "There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare." 427 U.S. at 62. The situation, he said, "would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." Id. at 71 n.35; see Genusa v. City of Peoria, 619 F.2d 1203, 1212 n.18 (7th Cir. 1980). Justice Powell also stressed his conclusion that the ordinance would not reduce the number or

the accessibility of adult theatres, or "restrict in any significant way the viewing" of adult films. 427 U.S. at 78, 81 n.4. These statements obviously cannot be applied to the Renton Ordinance.

The Court should consider not only the quantity, but also the quality, of the area where adult theatres are permitted. A theatre is a commercial (retail) land use, which logically belongs in an accessible area where people congregate. One cannot expect the theatre to operate in an industrial park which is dark and deserted at night, any more than one might expect it to locate in a sewage disposal site. The only location in the permitted area which could possibly be viable for a theatre is occupied by two fast food restaurants. (JA 231-32) By limiting

adult theatres to "the most unattractive, inaccessible, and inconvenient areas of" the City, Renton effectively guaranteed that no viable location would ever be available. See Basiardanes v. City of Galveston, 682 F.2d 1203, 1212-13, 1214 (5th Cir. 1982) (ordinance limiting adult theatres to light and heavy industry zones effectively banned them). If the City could constitutionally ban an activity from "the places where it should most appropriately be conducted," then the activity truly would have no constitutional protection. New York State Liquor Authority v. Bellanca, 452 U.S. 714, 723 n.10 (1981) (Stevens, J., dissenting) (regulation prohibiting topless dancing where liquor is

served).³ Renton went as far as it could go to prevent the establishment of adult theatres without explicitly banning them from the City. The ordinance drastically limits free speech, because it does not set aside any available area where theatres may reasonably be expected to operate. This drastic limitation calls for strict scrutiny by the Court.

3 Justice Stevens wrote:

If topless dancing is entitled to First Amendment protection, it would seem to me that the places where it should most appropriately be conducted are places where alcoholic beverages are served. A holding that a state liquor board may prohibit its licensees from allowing such dancing on their premises may therefore be the practical equivalent of a holding that the activity is not protected by the First Amendment.

The severe effects of the Ordinance should not be discounted because they regulate a form of expression which many find offensive, see Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975), or because some sexually explicit films are on the "borderline" of "pornography," see Young, supra, 427 U.S. at 61, 70-71. While the plurality opinion in Young implies a greater willingness to tolerate regulations that have an incidental effect on free expression if the materials involved are on the "borderline" of obscenity, it does not suggest any tolerance for drastic limitations on sexually explicit expression. Id. at 71 n.35. If a city may constitutionally enact a de facto ban on "borderline" protected speech, then this Court's carefully fashioned definition of obscenity will no longer have any meaning.

II. THE PURPOSE OF THE RENTON ORDINANCE IS TO RESTRICT EXPRESSION.

The standard of review articulated in Schad v. Borough of Mount Ephraim, supra, applies to a zoning ordinance which substantially limits free expression. It does not require a detailed examination of legislative motive or purpose. Under Schad, because the Renton Ordinance effectively bans a form of protected expression from the City, it is not "narrowly drawn" to further any substantial governmental interest and therefore cannot be upheld. 452 U.S. at 68-74. The City's motives are relevant, however, under the alternative standard of review suggested by Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), and Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

In Arlington Heights, the Court considered whether the Village's denial of a rezone application to permit an integrated low-income housing project was a denial of equal protection. Strict scrutiny was held appropriate "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision" 429 U.S. at 265-66. That determination demands "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including the impact of the government action, the historical background of the decision, the sequence of events leading up to the decision, and the legislative or administrative history. Id. at 266-68.

In Mt. Healthy, decided the same day as Arlington Heights, the Court applied a similar approach to a First Amendment claim. A teacher contended a school

board's refusal to renew his contract violated the First Amendment because it was motivated by his constitutionally protected conduct. The Court held plaintiff had the initial burden to show his conduct was protected and was a "substantial factor" or "a motivating factor" in the school board's decision.

[Plaintiff] having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct.

429 U.S. at 287.

While Arlington Heights and Mt. Healthy involved administrative decisions, the standard of review was extended to a legislative enactment in Hunter v. Underwood, _____ U.S. _____, 85 L.Ed.2d 222 (1985), where the Court considered whether a state constitutional provision disenfranchising

persons convicted of various crimes, though racially neutral on its face, denied equal protection because motivated in part by an intent to disenfranchise black citizens.

The Court may apply the Mt. Healthy standard of review as an alternative to the strict scrutiny suggested by Schad.⁴ Under that standard, the

⁴ The Schad standard is more appropriate because the Renton Ordinance has a substantial effect on free speech and discriminates on its face according to the content of expression. The Court's analysis of legislative motives in Arlington Heights, Mt. Healthy and Hunter was necessary because those cases involved governmental actions which had discriminatory effects but did not overtly discriminate. In Arlington Heights, the decision denying the rezoning application did not explicitly mention the race of low-income tenants, 429 U.S. at 258; in Mt. Healthy, the school board did not explicitly punish the teacher solely for engaging in protected speech, 429 U.S. at 282-83 & n.1; and in Hunter, the state constitutional provision was racially neutral on its face, 85 L.Ed.2d at

record demonstrates that the suppression of free speech was "a motivating factor" in enacting the Ordinance. Therefore, the City should have the burden to show the ordinance would have been enacted in the absence of that purpose.

The predominant purpose, if not the only purpose, of the Renton Ordinance is to restrict or ban adult theatres. The drastic impact of the ordinance, discussed above, "may provide an important starting point" in determining the City's motives. Village of Arlington Heights, supra, 429 U.S. at 266. The failure to include restrictions on other land uses that are believed to cause crime or urban decay, but that do not

(footnote 4, continued)

225, 227. The ordinance in this case is an explicit content-based regulation which should be measured against the standards of Schad, Carey and Mosley, supra.

involve protected speech, betrays the insincerity of the City's alleged concern for the quality of its neighborhoods. The City cannot "demonstrate that a uniform policy [regarding neighborhood preservation] in fact exists and is applied in a content-neutral fashion." Schad, supra, 452 U.S. at 84 (Stevens, J., concurring).

The legislative process began with a memorandum from the Mayor to the Council President, suggesting that the designation of "non-acceptable [adult] enterprises/localities" should occur before any adult business was licensed, because of the difficulty "some cities have had" passing ordinances "to respond to the public outcry" after such businesses were operating. (JA 411) The original ordinance was enacted with little public input and without any statement of purpose. (See JA 49-52) The Council's

rhetorical list of reasons was appended later, after the Appellees had commenced litigation against the City, to provide a post hoc justification. (App. 81a-86a, 88a-89a)

The "studies" relied upon by the City to support the ordinance involved very little empirical data. They consisted primarily of court decisions and legal memoranda describing the types of adult zoning ordinances which had been upheld by the courts. (JA 166-71) To the extent the "evidence" concerned the alleged "adverse secondary effects" of adult theatres, such effects were generally described without regard to where such theatres are located. (JA 70-72, 76-77, 133-34, 172-73, 174) For example, the testimony that adult theatres might cause an increase in certain crimes and lower property values

did not suggest it is more appropriate to place them in some areas than in others.

The City has cited no data specifically addressing the proximity of adult theatres to residential areas, schools, churches, etc. The evidence reviewed in Young concerned the effects of concentrating several adult theatres in a single neighborhood. 427 U.S. at 55, 71 & n.34 (plurality opinion); id. at 74-75, 81 n.4, 82 (concurring opinion). The other materials cited by the City are relied upon to support its conclusion that adult theatres may be harmful wherever they are located, and thus only demonstrate the City's interest in banning them entirely. See Brief For Appellants, at 22, 24-27.

As the U.S. Magistrate found, many of the policy statements grafted onto the ordinance after litigation commenced

are thinly veiled statements of distaste for the content of sexually explicit entertainment. (App. 44a) Some of the policy statements argue that adult theatres have negative effects, but are not tied in any way to where they are located. For example:

14. Experience in numerous other cities, including Seattle, Tacoma and Detroit, Michigan, has shown that location of adult entertainment land uses degrade [sic] the quality of the areas of the City in which they are located and cause a blighting effect upon the city. The skid row effect, which is evident in certain parts of Seattle and other cities, will have a significantly larger affect [sic] upon the City of Renton than other major cities due to the relative sizes of the cities.
15. No evidence has been presented to show that location of adult entertainment land uses within the City will improve the commercial viability of the community.

19. The community will be an undesirable place to live if it is known on the basis of its image as the location of adult entertainment land uses.

1. Many parents have chosen the City of Renton in which to raise their families because of the lack of pornographic entertainment outlets with its [sic] influence upon children external to the home.

3. Citizens from other cities and King County will travel to Renton to view adult film fare away from areas in which they are known and recognized.
4. Property values in the areas adjacent to the adult entertainment land uses will decline, thus causing a blight upon the commercial area of the City of Renton.

(App. 83a-84a, 85a-86a)⁵ Some of the policy statements are highly contrived, such as the suggestion that the presence of pornographic material in the City "has a degrading effect upon the relationship between spouses." (App. 86a)

Some of the policy reasons are improper on their face. For example, one statement argues that "students walking to school [should] not be subjected to confrontation with the existence of adult entertainment land uses." Another statement appears to make a similar argument about people walking to and from churches. (App. 82a,

5 Some of the other policy statements are awkwardly phrased, giving the impression that references to "close proximity" to schools, churches and the like were inserted after the statements were drafted. (See statement no. 4, App. 82a; nos. 11, 12, 13, App. 83a; no. 6, App. 86a)

84a) These conclusions reflect only the notion that the outward appearance of an adult theatre is offensive to some people. See Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 546-47 (Stevens, J., concurring); Erznoznik, supra; Cohen v. California, 403 U.S. 15, 21-23, reh'g denied, 404 U.S. 876 (1971).

Of course, the City has not attempted in this ordinance to regulate the outward appearance of theatres. The ordinance discriminates among theatres solely by the content of the films shown inside. The style of the films themselves might be considered "ugly in a particular setting," as indecent language has been regarded, Consolidated Edison Co., supra, 447 U.S. at 547 & n.8, citing Federal Communications Commission v. Pacifica Foundation, 438

U.S. 726, 745-46 (plurality opinion), reh'g denied, 439 U.S. 883 (1978) (radio broadcast). But people passing by the theatre are not subjected to the films. They are subjected only to the message that adult films are shown inside.

In its concern for the effect of the theatres on passers-by, Renton has attempted to stifle the very message that adult films exist. This expresses the City's impermissible hostility toward the point of view of the theatre operator, who seeks to promote a lawful form of entertainment. See Young, 427 U.S. at 67, 70 (plurality opinion). The purpose is to suppress "the communicative aspects" of marquees and signs, a purpose which violates the First Amendment. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502 (1981) (plurality opinion).

The record does not show the City gave any consideration to selecting a geographical area where adult theatres were considered appropriate. (See JA 175, 176, 231, 241) The zone "set aside" for such theatres was not really set aside at all, but apparently was determined only by a process of elimination. (See JA 30-31, 201-02) City officials may have given thought to designating areas where adult theatres did not belong, but apparently no one ever considered whether the remaining area was suitable for theatres.

The scope of the Renton Ordinance is further evidence of its purpose. Its restrictions apply exclusively to activity involving free speech, while in Young Detroit only added adult bookstores and theatres to a list of other property uses (bars, hotels, pawn shops, billiard halls, secondhand stores, taxi

dance halls, etc.) that were subject to the same restrictions. American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014, 1021 (6th Cir. 1975) (Celebrezze, J., dissenting), rev'd in Young, supra.

These factors, taken together, suggest very clearly that the Renton City Council was motivated by hostility toward adult theatres, and not by any legitimate zoning concerns. The City has "[used] the power to zone as a pretext for suppressing expression." Young, 427 U.S. at 84 (Powell, J., concurring). "[W]hen the illicit motive of suppressing speech is apparent to the public or stands revealed with unmistakable clarity, validating the law would serve to legitimate a transparent and potentially chilling abridgment of individual liberty." L. Tribe, American

Constitutional Law, § 12-6 at 595 (1978)
(footnotes omitted).

III. THE ORDINANCE IS UNCONSTITUTIONAL UNDER THE O'BRIEN TEST.

Even if the Court applies the less rigorous test of United States v. O'Brien, supra, the Renton Ordinance still violates the First Amendment.

A. There Is Insufficient Evidence That The Ordinance Furthers An Important Interest Unrelated To The Suppression Of Free Speech.

Under the standards announced in O'Brien, Renton has the burden to show that the ordinance furthers an important or substantial governmental interest, that the interest is unrelated to the suppression of free speech, and that the restriction on First Amendment rights is no greater than essential to further that interest. As discussed above, the record demonstrates that the interest underlying the ordinance is not

unrelated to the suppression of free speech. However, decisions applying the O'Brien test have also considered whether the government has provided sufficient evidence to show that a statute actually furthers a permissible and substantial governmental interest.

Assuming for the purposes of argument that the Renton Ordinance is intended to prevent urban decay, to preserve residential neighborhoods, to prevent crimes, and to preserve property values, there is insufficient evidence that the ordinance actually furthers those interests.

In Young, "it was emphasized . . . that the evidence presented to the Detroit Common Council indicated that the concentration of adult movie theatres in limited areas led to deterioration of surrounding neighborhoods . . . " Schad, supra, 452 U.S. at

71-72 (footnote omitted). The evidence considered in Detroit tended to show that the concentration of adult theatres in close proximity to one another caused certain negative effects; and in light of that evidence, Detroit provided that adult theatres, along with other land uses, must be located at minimum distances from one another.

In Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 719, 585 P.2d 1153, 1159 (1978), cert. denied, 441 U.S. 946 (1979), the state court found adequate evidence of "the effects of adult movie theater locations on residential neighborhoods." Relying on that evidence, the Seattle City Council enacted an ordinance requiring that adult theatres be located away from residential neighborhoods, and concentrated in the City's central business district. 90 Wash.2d at 711-13, 585

P.2d at 1155-56. (The area set aside by Seattle for adult theatres was arguably "appropriate" for such uses, because 10 of the City's 13 existing adult theatres were already located there. 90 Wash.2d at 711, 585 P.2d at 1155.)

The issue in these cases is not whether the empirical evidence supporting a legislative enactment is credible or disputed by experts, but whether it actually tends to support the action taken by a legislative body. If it does not, there is no well-reasoned and substantial basis for the statute or ordinance. As this Court noted in Erznoznik, supra, "even a traffic regulation cannot discriminate [against speech] on the basis of content unless there are clear reasons for the distinctions." 422 U.S. at 215; see Schad, supra, 452 U.S. at 68-70, 72-74.

Appellants argue that Renton is entitled to rely on empirical data from other cities to support its zoning ordinance. They emphasize that there were no adult theatres in Renton when the ordinance was first enacted, so the City had no actual experience with the effects of such theatres. The problem with their argument is not that the evidence derives from the experience of other cities, but that none of the evidence in the record supports the specific type of zoning ordinance which Renton chose to enact.

The evidence relied upon by Detroit supported the dispersal of adult theatres, but Renton does not require that adult theatres be located at any distance from one another. The evidence relied upon by Seattle supported a requirement that adult theatres be separated from residential neighborhoods

and concentrated in a central business district; but Renton has chosen to banish adult theatres from its central business district. Renton cannot point to any evidence considered by its City Council which deals with the alleged effects of adult theatres located in close proximity to parks, schools, or churches. The separation of adult theatres from those uses is justified only by vague and conclusory statements in the record.

Appellants rely extensively on Genusa v. City of Peoria, supra, 619 F.2d at 1211, where the Seventh Circuit said, "A legislative body is entitled to rely on the experience and findings of other legislative bodies as a basis for action." But that reasoning was employed only to sustain a Peoria provision which imposed the same requirement as Detroit's ordinance, the requirement

that "adult uses" be separated from one another. Id. at 1211-12 & n.18. Thus it offers no support for Appellants' position in the present case.

Most of the "evidence" on which the City relied was not evidence at all, but information regarding the types of ordinances that had been upheld when enacted by other cities. (JA 166-71) The remainder of the "evidence" consisted of conclusory statements that adult theatres cause harm, wherever they are located. (JA 70-72, 76-77, 133-34, 172-73, 174) The interest in keeping adult theatres out of the City entirely is obviously not unrelated to the suppression of free speech.

Renton did not attempt to determine whether the ordinance it enacted would accomplish any salutary goal other than the complete banishment of adult theatres. Its primary concern was to

pass an ordinance which appeared to serve legitimate zoning interests, and therefore would be held constitutional. This is not to suggest that it is improper for cities to consider constitutional issues in drafting legislation. But consideration of court decisions is no substitute for review of facts establishing the need for a particular zoning provision. The record simply does not support a finding that the Renton Ordinance furthers any interest other than the suppression of sexually explicit entertainment.

B. The Ordinance's Restriction On First Amendment Freedom Is Greater Than Is Essential To The Furtherance Of The City's Legitimate Interest.

Under the O'Brien test, even if the Court determines that the Renton Ordinance furthers an important interest unrelated to the suppression of free

speech, the ordinance can only be upheld if its restriction on First Amendment rights "is no greater than is essential to the furtherance of that interest." O'Brien, 391 U.S. at 377. This element of the O'Brien test requires the Court to balance the right of free expression against the City's asserted interests. See Young, 427 U.S. at 80 (Powell, J., concurring).

While the City has a legitimate interest in preserving the character of certain neighborhoods, it clearly has no legitimate interest in banning a protected form of expression on the basis of its content. See Schad, supra, 452 U.S. at 69-74. The availability of similar entertainment in nearby cities cannot justify a total ban. Id. at 76-77. Even if the Court does not agree that the Renton Ordinance amounts to a de facto ban on adult theatres, the

Court must consider how severely a city may restrict the location of businesses engaged in constitutionally protected activity. Under the O'Brien test, there must be some point, short of a total ban, where a zoning ordinance is too restrictive to be tolerated.

Here, the City not only has excluded adult theatres from any locations within 1,000 feet of residences, schools or churches, but also has banished them from all of its established retail shopping areas. Although the operative provisions of the ordinance do not mention the City's central business district, the City Council expressed in its statement of policy the concern that adult theatres would cause harm in "commercial areas of the City." (App. 82a, 83a, 86a) The record also shows the City made no effort to identify any area appropriate for adult theatres.

Because of the First Amendment interest at stake, the Court should at least require that any city which seeks to restrict the location of protected activities must undertake a good-faith effort to set aside a reasonably adequate area for such activities. The area set aside must not only be sufficiently large, but also reasonably appropriate for the type of activity involved. If the "commercial areas" of a city are placed off limits, then clearly the city has not attempted to accommodate theatre operators, because those are the areas where theatres reasonably can be expected to operate. (See JA 230)

Zoning ordinances present a special kind of problem under the O'Brien test. A wide variety of governmental interests can be asserted to justify a variety of restrictions. If there is no reasonable

attempt to accommodate activities protected by the First Amendment, then the ordinance by definition goes too far. Some of the interests asserted by the City in this case are not substantial and should be disregarded. While there may be a legitimate interest in removing adult theatres from residential neighborhoods, a provision requiring that they be located at least 1,000 feet from any residence does more than is necessary to further that interest. This is especially so when a city's commercial areas are located in close proximity to residences (see JA 42), so that the provision effectively bars theatres from commercial areas as well. By any reasonable standard, Renton has done too much to restrict adult theatres in its ordinance, and nothing to preserve their freedom of expression.

IV. INDEPENDENT APPELLATE REVIEW OF THE FACTS IS APPROPRIATE.

In Bose Corp. v. Consumers Union of United States, Inc., _____ U.S. _____, 80 L.Ed.2d 502, reh'g denied, _____ U.S. _____, 82 L.Ed.2d 863 (1984), the Court considered whether the evidence was adequate to show the defendant had published false statements regarding plaintiff's product with "actual malice." To make that determination, the Court reviewed the record independently, acknowledging "a constitutional responsibility that cannot be delegated to the trier of fact," whether jury or judge. 80 L.Ed.2d at 516-17. The Court noted:

[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure "that the judgment does not constitute a forbidden intrusion on the field of free expression."

Id., 80 L.Ed.2d at 515 (citations omitted).

It was also appropriate for the Court of Appeals to review the facts independently in this case, where the determination of "ultimate facts" may control the outcome of another important First Amendment issue. The trial court's determination of the facts inevitably involved "broadly social judgments . . . lying close to opinion . . ." Id. at 516 n.16, quoting Baumgartner v. United States, 322 U.S. 665, 670-71 (1944). The fact that the District Judge and the Magistrate reached opposite factual conclusions from the same evidence demonstrates the role of subjective opinion in reaching those conclusions, and underscores the need for the appellate courts to review the record independently.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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